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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-102

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

Petitioner,

v.

CARTE BLANCHE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	PAGE
TABLE OF CITATIONS	ii
PETITION FOR A WRIT OF CERTIORARI	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULE INVOLVED	4
STATEMENT OF THE CASE	9
The Complaint	9
The Class Action	10
The Court of Appeal's Decisions	11
Subsequent Events	12
REASONS FOR GRANTING THE WRIT	13
I. The Court Of Appeals Has Decided Federal Questions In A Way In Conflict With Applicable Decisions Of This Court	13
II. The Court Of Appeals Has Decided Important Questions Of Federal Law Which Have Not Been, But Should Be, Decided By This Court	18
CONCLUSION	21

TABLE OF CITATIONS

CASES PAGE

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 13, 14, 15, 17

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 18

Edwin L. Wiegand Co. v. Jurinko, 414 U.S. 970 (1973) 17

Eisen v. Carlisle & Jacquelin, — U.S. —, 94 S.Ct. 2140 (1974) 2, 12, 13, 15, 16, 17

Katz v. Carte Blanche Corp., 496 F.2d 747 (C.A. 3, 1974) (*en banc*) 1, 11, 12, 17

Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D.Pa. 1971) 1, 10

Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D.Pa. 1971) 1, 10

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 506 (1950) 15

STATUTES, CONSTITUTIONAL PROVISION AND RULE OF COURT

Section 130(a) of the Consumer Credit Protection Act, 15 U.S.C. §1640(a) 4, 9

15 U.S.C. §1640(e) 9

28 U.S.C. §1254(1) 2

28 U.S.C. §1292(b) 10

28 U.S.C. §1337 9

United States Constitution, Fifth Amendment 4

Rule 23, Federal Rules of Civil Procedure 1, 3, 4-8, 10, 13, 15, 17, 18

OTHER AUTHORITIES

	PAGE
12 C.F.R. §226.407	9
Advisory Committee's Note to Rule 23, 39 F.R.D. 98 (1966)	19
Black's Law Dictionary (Revised 4th Edition 1968)	19

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Reuben J. Katz prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered on March 15, 1974, which reversed an Order of the United States District Court for the Western District of Pennsylvania holding that Petitioner's action was maintainable as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The 6-3 decision of the Court of Appeals was reached following an *en banc* rehearing which was granted upon Respondent's petition after a panel of the Court of Appeals unanimously affirmed the Order of the district court.

The following opinions are printed in the Appendix, as indicated:

(1) Opinion of the Court of Appeals dated March 15, 1974, as amended, April 9, 1974, reported at 496 F.2d 747 (C. A. 3, 1974) (*en banc*) (1a);[1]

(2) Opinion of the district court dated November 18, 1971, as amended, November 26, 1971, the order reversed by the Court of Appeals, holding that Petitioner's action satisfied the requirements of Rule 23(b)(3) and was maintainable as a class action, reported at 53 F.R.D. 539 (W.D.Pa. 1971) (62a);

(3) Opinion of the district court dated June 1, 1971, holding that Petitioner's action met the prerequisites of Rule 23(a), reported at 52 F.R.D. 510 (W.D.Pa. 1971) (81a).

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1. "—— a" references herein are to the designated page number of the Appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was entered on March 15, 1974. On June 11, 1974, Mr. Justice William J. Brennan, Jr., sitting as Circuit Justice, granted Petitioner's Application for Extension of Time Within Which to File Petition for Writ of Certiorari, extending the time for filing this Petition to and including August 12, 1974. On July 3, 1974, the Court of Appeals *(en banc)* denied Petitioner's motion for leave to file a petition for rehearing out of time. That motion was filed subsequent to and as a result of this Court's May 28, 1974, opinion in ***Eisen v. Carlisle & Jacquelin,*** —— U.S. ——, 94 S.Ct. 2140 (1974). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Do the provisions of Rule 23(c)(1) and (c)(2), which provide that class action determinations shall be made as soon as practicable after the commencement of an action, that class determinations may be altered or amended only before any decision on the merits, and that notice to class members is mandatory in Rule 23(b)(3) class actions, preclude the postponement of class action determinations until after resolution of liability issues?

2. Do the provisions of Rule 23(c)(1) and (c)(2), which provide that class action determinations shall be made as soon as practicable after the commencement of an action, that class determinations may be altered or amended only before any decision on the merits, and that notice to class members is mandatory in Rule 23(b)(3) class actions, preclude postponing, at a defendant's request, the notice to which class members are entitled until after resolution of liability issues?

3. Can a judgment in a single case which is not tried as a class action and by which a defendant does not agree to be bound in any subsequent action be given offensive collateral estoppel effect against that defendant in subsequent actions brought by other previously unidentified plaintiffs?

4. In assessing the relative superiority of available methods for the fair and efficient adjudication of consumer claims under Rule 23(b)(3), may the district court consider, as an available alternative, an individual action by which the defendant does not agree to be bound in future litigation, denominated as a

"test case," which will be given offensive collateral estoppel effect in future disputes involving that defendant?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULE INVOLVED

The constitutional provision involved is the due process clause of the fifth amendment to the United States Constitution. The statutory provision involved is Section 130(a) of the Consumer Credit Protection Act, commonly referred to as the Truth-in-Lending Act (the Act), 15 U.S.C. §1640(a). The rule involved is Rule 23 of the Federal Rules of Civil Procedure.

The text of the due process clause of the fifth amendment is as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The text of Section 130(a) of the Act is as follows:

> (a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
>
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

The text of Rule 23 is as follows:

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable

to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through

reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that

notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

The Complaint

The complaint alleges that from and after July 1, 1969, the effective date of the Act, the Respondent, a national credit card company, failed to comply with the disclosure provisions of the Act in connection with the three finance charges which it imposes upon its cardholders. The three finance charges are:

(1) The annual charge imposed upon cardholders as a condition to the use of the credit card to make credit purchases;[2]

(2) The charge which the Respondent imposes on outstanding balances which are not paid within a certain period of time;

(3) The charge which the Respondent imposes in connection with purchases made under its deferred payment plans.

As relief, Petitioner seeks the statutory damages provided for by Section 130(a) of the Act, 15 U.S.C. §1640(a). Jurisdiction in the district court was predicated on 15 U.S.C. §1640(e) and 28 U.S.C. §1337.

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2. Subsequent to the commencement of this action, the Federal Reserve Board issued an interpretation which states that an annual fee for participating in a credit plan is not a finance charge within the meaning of the Act because it is imposed as a qualification of membership and for issuance of the credit card and not as an incident of or condition of any specific extension of credit. 12 C.F.R. §226.407. On June 5, 1974, the trial judge granted partial summary judgment in favor of the Respondent with respect to this aspect of the litigation.

The Class Action

The action was commenced on November 20, 1969, as a class action on behalf of all of the Respondent's cardholders upon whom any of the improperly disclosed or undisclosed finance charges were imposed. On June 1, 1971, after extensive discovery, briefing and arguments, the district court held that the prerequisites of Rule 23 (a) were satisfied. *Katz v. Carte Blanche Corp.*, 52 F.R.D. 510 (W.D.Pa. 1971) (81a). In the Order accompanying that Opinion, the parties were directed to submit additional memoranda addressed to the Rule 23(b)(3) criteria of predominance and superiority. Following submission of the memoranda together with a comprehensive stipulation of facts relating to the Rule 23 issues, the district court held an evidentiary hearing concerning the questions of predominance and superiority. Thereafter, in the exercise of its discretion, the district court concluded that the Rule 23(b)(3) criteria were satisfied, held that the action could be maintained as a class action, and established a procedure for accomplishing individual notice to class members. *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539 (W.D.Pa. 1971) (62a). In that same Opinion, the district court stated that its interlocutory order was one involving a controlling question of law as to which there was substantial ground for difference of opinion, and certified it for an immediate appeal pursuant to 28 U.S.C. §1292(b).

The Court of Appeals' Decisions

A panel of the Court of Appeals permitted an appeal to be taken by the Respondent and, thereafter, affirmed the district court's Order. Subsequent thereto, the Respondent's petition for rehearing was granted, the panel's decision was vacated, and the case was reargued before the Court of Appeals *en banc*.

On March 15, 1974, the Court of Appeals (Seitz, Chief Judge, Aldisert and Adams, Circuit Judges, dissenting) reversed the order of the district court which had held that this action may be maintained as a class action. *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (C.A. 3, 1974) (1a). The Court of Appeals held:

> (1) A single case resulting in a judgment will be given offensive collateral estoppel effect in favor of non-parties against a losing defendant, 496 F.2d 747, 758-59. (19-22a).
>
> (2) Because a single case can result in a judgment which will be given offensive collateral estoppel effect in favor of non-parties against a losing defendant, such a single case can be treated as a "test case," notwithstanding the defendant's willingness or unwillingness to be bound by its outcome, and must be considered as an available alternative in determining whether a class action is the superior method for adjudicating a controversy. 496 F.2d 747, 758-762. (19-29a).
>
> (3) Class action determinations may be postponed until after a trial on liability issues since neither potential class members nor defendants are prejudiced thereby. 496 F.2d 747, 760. (24a, 25a).

(4) Where a defendant makes a nonfrivolous[3] claim that it will be prejudiced by the mailing of notice, notice may be postponed until liability has been established. 496 F2d. 747, 760. (25a).

(5) A defendant confronted by a potential class suit has an option either to exercise its right to insist upon early class action determination and notice or to resurrect the practice of one-way intervention which the 1966 amendments to Rule 23 were intended to eliminate. 496 F.2d 747, 759-762. (22-29a).

Subsequent Events

After this Court rendered its decision in *Eisen v. Carlisle & Jacquelin,* —— U.S. —— 94 S.Ct. 2140 (1974), Petitioner filed a motion for leave to file a petition for rehearing out of time on June 10, 1974, which motion was referred to the Court of Appeals *en banc,* and subsequently denied on July 3, 1974. Petitioner simultaneously filed a petition for writ of mandamus in the Court of Appeals (docketed at No. 74-1563) because the trial court has declined to rule on the extent to which this Court's decision in *Eisen* affects the earlier Court of Appeals' mandate. The mandamus petition was also referred to the Court of Appeals *en banc.* Pursuant to the Court of Appeals' directive, briefs were submitted on July 23, 1974, but no decision has yet been reached. Because of the necessity for submitting this Petition by August 12, 1974, Petitioner is unable to await the outcome of the mandamus proceeding before seeking relief from this Court.

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3. Although the Court of Appeals concluded that the Respondent's claim was "nonfrivolous," Petitioner contends that this position is neither supported by nor reflected in the record.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Has Decided Federal Questions In A Way In Conflict With Applicable Decisions Of This Court.

The Court of Appeals' decision conflicts with applicable decisions of this Court relating to when class action determination must be made, the abandonment of one-way intervention in class actions, and the requirement of notice to Rule 23(b)(3) class members as an element of due process.

A class action determination must be made before a decision on the merits in order to enable the nominal plaintiff to provide absent class members with the notice to which they are entitled and to eliminate one-way intervention. The Court of Appeals' holding that the class determination and notice to absent class members must be postponed until the Respondent's liability under the Act is determined conflicts with the prior decision of this Court in *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974), and the subsequent decision of this Court in *Eisen v. Carlisle & Jacquelin,* — U.S. — 94 S.Ct. 2140 (1974). In *American Pipe,* where this Court considered the question of when class determinations must be made, the Court reached the following conclusions with respect to early class determinations, one-way intervention, and the need for notice:

> A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence

at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation — the potential for so-called "one-way intervention" — aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.

Under the present Rule, a determination whether an action shall be maintained as a class action is made by the court "[a]s soon as practicable after the commencement of an action brought as a class action. . . ." Rule 23 (c)(1). Once it is determined that the action may be maintained as a class action under subdivision (b)(3), the court is mandated to direct to members of the class "the best notice practicable under the circumstances" advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not if they do not request exclusion, and that a member who does not request exclusion may enter an appearance in the case. Rule 23 (c)(2). Finally, the present Rule provides that in Rule

> 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion. Rule 23(c)(3). Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practicable after the commencement" of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either non-parties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse. 414 U.S. 538, 547-9. (Footnotes omitted.)

It is apparent from the foregoing, as pointed out by Judge Aldisert in his dissenting opinion (45-52a), that *American Pipe* precludes the result reached by the majority in this case.

Thereafter, in *Eisen*, this Court, relying in part upon its previous decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), squarely affirmed the Rule 23(c)(1) mandate that the district court determine whether a suit denominated a class action may be maintained as such "as soon as practicable after the commencement of an action. . . ." This Court rejected the plaintiff's contention that individual notice was not required, holding:

> . . . individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23 . . . [E]ach class member who can be identified through reasonable effort

must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. —— U.S. ——, ——, 94 S.Ct. 2140, 2152.

Eisen also rejected the notion that a defendant can be compelled to bear the costs of notice as ordered by the trial court after a preliminary hearing on the merits. This Court held succinctly, in contrast to the Court of Appeals in the instant case, that the determination of whether an action may proceed as a class action can not be based on considerations concerning the merits of a particular case, stating:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "[as] soon as practicable after the commencement of [the] action . . . ." In short, we agree with Judge Wisdom's conclusion in Miller v. Mackey International, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:

> "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.*, at 427.
>
> —— U.S. ——, ——, 94 S.Ct. 2140, 2152-2153.

Furthermore, Rule 23(c)(1) also provides that orders under that subdivision "may be conditional and may be altered or amended *before the decision on the merits.*" (Emphasis added.) Petitioner submits that an order which may not be altered or amended after a decision on the merits cannot be issued initially after a determination of Carte Blanche Corporation's liability. Nevertheless, the Court of Appeals has ordered that just such procedure be followed in these proceedings. In light of the conflict with *American Pipe*, *Eisen* and the clear language of Rule 23, the judgment of the Court of Appeals in *Katz* must be vacated, and the case remanded for further consideration in light of this Court's subsequent decision. *See* e.g., *Edwin L. Wiegand Co. v. Jurinko*, 414 U.S. 970 (1973).

II. The Court Of Appeals Has Decided Important Questions Of Federal Law Which Have Not Been, But Should Be, Decided By This Court.

This case involves issues of considerable importance concerning the future efficiency of class actions as a vehicle for resolving disputes involving consumer claims under federal regulatory statutes. Though Petitioner's action was brought only under the Truth-in-Lending Act, the Court of Appeals' interpretation of the law relating to mutuality of estoppel and Rule 23 will have wide-ranging ramifications on the enforcement of the anti-trust, securities and antidiscrimination laws by private attorneys general.

In deciding an issue which was neither briefed nor argued by the litigants, the Court of Appeals took the unprecedented step of prospectively determining the effect of an unrendered judgment in future litigation between unidentified absent persons and the Respondent. The Court of Appeals' decision was bottomed on this Court's opinion in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971), which was held to require that a "new look be taken at the alternative of a test case in lieu of an early class action determination." 496 F.2d 747, 760. (24a). *Blonder-Tongue,* while holding mutuality of estoppel unessential where a patentee sought to relitigate the validity of a patent which had been declared invalid previously, dealt only with the defensive use of collateral estoppel. The instant case involves offensive use of collateral estoppel, the use of a judgment obtained by a different plaintiff in a prior suit against the same defendant, to establish liability in an non-patent context where different considerations might apply.

Not only has this Court never decided whether an individual judgment can be given offensive collateral estoppel effect as contemplated by the Court of Appeals, it has never decided whether an individual action not expressly designated as a test case by the parties can be denominated a "test case" and therefore an available alternative to a class action. The Advisory Committee's Note to Rule 23 states that "one or more actions *agreed to by the parties* as test or model actions may be preferable to a class action . . . ." 39 F.R.D. 98, 103 (1966). (Emphasis added.) Because the Respondent has standfastly refused to agree to treat Petitioner's action as a test case, Petitioner submits that the Advisory Committee's comment is inapplicable to the present action.

According to Black's Law Dictionary (Revised 4th Edition 1968), a test action is:

> An action selected out of a considerable number of suits, concurrently depending in the same court, brought by several plaintiffs against the same defendant, or by one plaintiff against different defendants, all similar in their circumstances, and embracing the same questions, and to be supported by the same evidence, the selected actions to go first to trial, (under an order of court equivalent to consolidation,) and its decision to serve as a *test* of the right of recovery in the others, all parties agreeing to be bound by the result of the test action.

The trial judge in this case rejected the test case as a possible viable alternative and reached a conclusion consistent with the Advisory Committee's Note and the traditional concept of a test case. The trial court's conclusion was inescapable since the Respond-

ent refused to be bound by any test case and the Petitioner cannot obtain the express consent of unidentified parties. The only way in which the Petitioner can bind absent class members by his actions is in a class action after notice.

CONCLUSION

For the reasons stated above, this Honorable Court should grant the Petition For A Writ Of Certiorari to review the issues raised therein on the merits or to remand the case for consideration by the Court of Appeals *en banc*.

Respectfully submitted,

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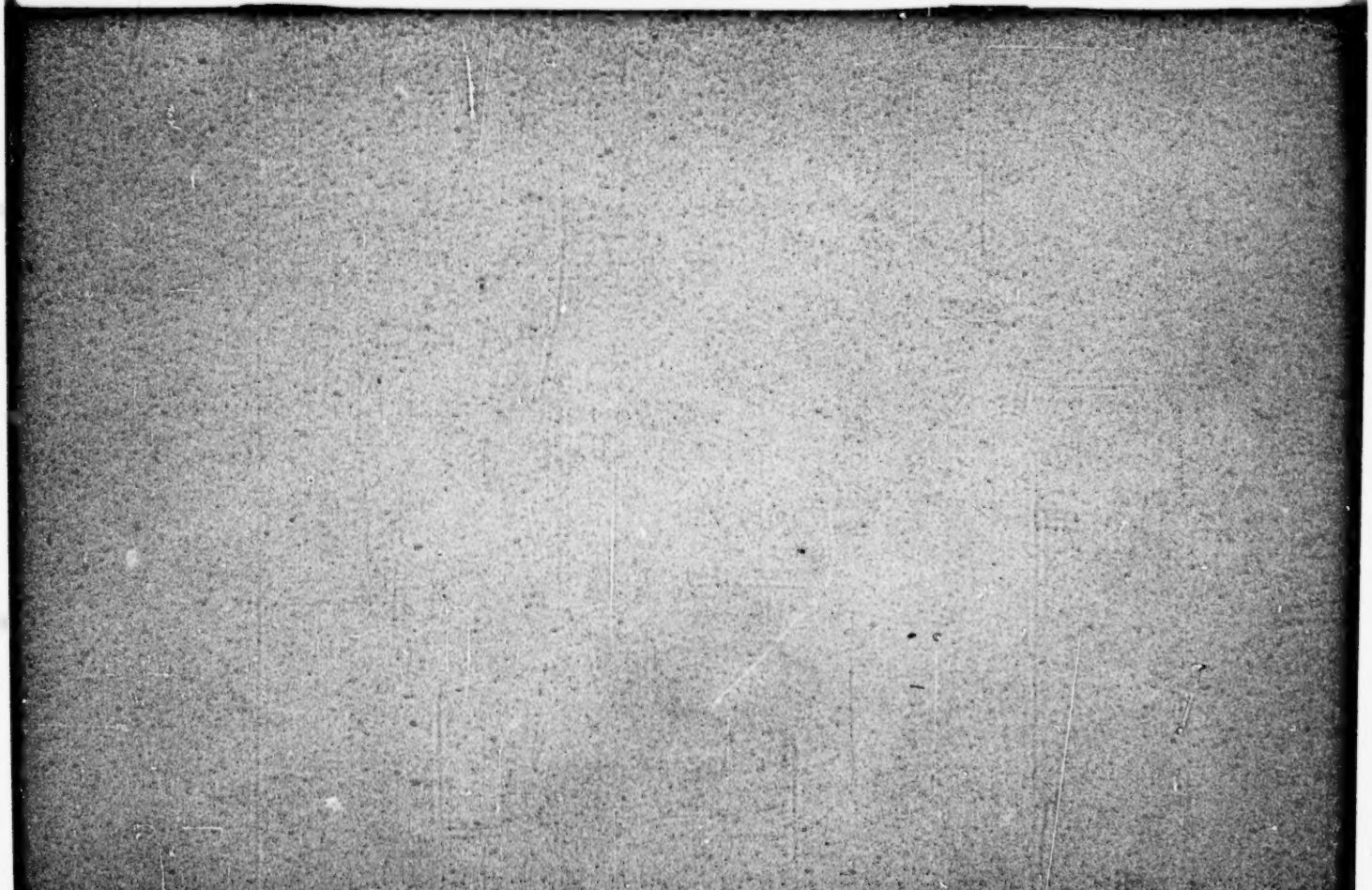

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October Term, 1974

No. 74-102

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

Petitioner,

v.

CARTE BLANCHE CORPORATION,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX TO APPENDIX

	PAGE
Opinion of the United States Court of Appeals 3/15/74	1a
Opinion of the Court	1a
Dissenting Opinion of C. J. Seitz	32a
Dissenting Opinion of J. Aldisert	45a
Dissenting Opinion of J. Adams	52a
Opinion of the District Court 11/18/71	62a
Opinion of the District Court 6/1/71	81a
Amended Judgment of the United States Court of Appeals 4/16/74	94a
Order of the United States Court of Appeals 7/3/74	95a

Opinion of the United States Court of Appeals

Reuben J. KATZ, on behalf of himself
and all others similarly situated,

v.

CARTE BLANCHE CORPORATION,
Appellant.

No. 72-1054.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Argued Feb. 1, 1973.
Reargued en banc Nov. 15, 1973.
Decided March 15, 1974.
As Amended April 9, 1974.

Argued Feb. 1, 1973.

Before SEITZ, Chief Judge, ALDISERT, Circuit Judge and FISHER, District Judge.

Reargued Nov. 15, 1973.

Before SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges.

GIBBONS, Circuit Judge

This appeal is before us pursuant to the Interlocutory Appeals Act of 1958, 28 U.S.C. §1292(b). The appellant Carte Blanche Corporation (Carte Blanche) seeks review

of an order of the district court which granted the pretrial motion of the plaintiff Katz that his suit be maintained as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure and directed that notice be sent to the alleged members of the class.

Carte Blanche is a national credit card company. Its members pay an annual membership fee of $15.00 which gives them the privilege of charging items at the company's associated establishments. Carte Blanche purchases the charge slips from the associated establishments at a discount, and invoices the members for the face amount. Katz, who after intervening was substituted for a previously named plaintiff, Stept, seeks statutory damages and costs of suit, including a reasonable attorneys fee, for Carte Blanche's alleged failure to make pre-transaction and transaction disclosures regarding the computation of finance charges to its members in violation of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1681t. The three allegedly improperly disclosed finance charges are

(1) The $15 annual membership charge;[1]

(2) The late charge assessed on overdue unpaid balances;[2] and

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[1] The Federal Reserve Board interpretation of TILA is that the annual fee for membership in a credit plan is not a finance charge because it is imposed as a qualification of membership in the plan and for issuance of the card, and not as an incident of or condition of any specific extension of credit. 12 C.F.R. § 226.407. Katz disputes this Federal Reserve Board interpretation. *But see* note 6 *infra*.

[2] The Federal Reserve Board interpretation of TILA is that a "late payment, delinquency, default, reinstatement, or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default or other such occurrence." 12 C.F.R. § 226.4(c). Katz claims that the late charges are in fact finance charges for which disclosure is required. *See* 15 U.S.C. § 1605(a); 12 C.F.R. § 226.401.

(3) The finance charge on an extended payment plan for purchase of airline tickets.

TILA's disclosure provisions apply only to extensions of consumer credit. Thus persons using a Carte Blanche credit card for business are not protected by the Act from the allegedly inadequate disclosures. Katz claims to be a nonbusiness card user, and to represent all other such users. He seeks recovery pursuant to 15 U.S.C.A. § 1640(a):

> "Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1000; and
>
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court."

Katz, or any other card holder, in order to establish Carte Blanche's liability under § 1640(a), must show: (1) that a given charge was a finance charge within the meaning of TILA; (2) that the disclosure with respect to that charge was not in compliance with the applicable TILA regulations; and (3) that the charge was imposed in connection with a consumer credit transaction, not a business transaction. The first two showings focus on the uniform conduct of Carte Blanche. The third showing focuses on the separate conduct, and possibly the subjective intention,

of each Carte Blanche member. In the district court Katz moved for a determination that the case proceed as a class action in which he represented a class consisting of all Carte Blanche credit card holders, since all such holders had been charged the $15 annual membership fee, and such a class would include all who had been assesed an overdue payment charge or an extended payment airline ticket charge. That class would include somewhere between 717,000 and 800,000 members. If Katz succeeded in establishing liability to every class member for the minimum recovery specified in § 1640(a)(1) the liability would be substantially in excess of Carte Blanche's net worth. The record does not establish how many would be included in a class restricted to members who had been assessed late charges since the effective date of TILA. Nor does it establish the number of persons who have paid extended payment charges for airline tickets, although Katz estimates this number at 40,000.

The district court first considered whether Katz' complaint satisfied the prerequisites of Fed.R.Civ.P. 23(a). The court readily concluded that the class was too numerous for joinder of all members, that there were questions of law or fact common to the class, and that Katz would fairly and adequately represent the class. Thus three of the prerequisites of rule 23(a) were satisfied. In examining the fourth prerequisite, "the claims . . . of the representative parties are typical of the claims . . . of the class," Fed.R.Civ.P. 23(a)(3), the court was aware that each class member in order to recover would have to show that the transaction on which he based his claim was a consumer and not a business transaction. But concluding that

Katz' claims were coincident and not in conflict with those of the class, it found this requirement was satisfied as well. The district court had doubts, initially, that it could make the findings required by rule 23(b)(3) that questions of law or fact common to the class predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See* Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D.Pa.1971). After further briefing and argument, however, the district court, over Carte Blanche's strenuous objection, overcame its doubts and entered an order (1) granting Katz' motion that the action proceed as a class action on behalf of all authorized holders of one of Carte Blanche's credit cards since July 1, 1969, the effective date of TILA, and (2) directing that a notice of the pendency of the action be sent to each member, the initial cost, estimated at $37,500, to be borne by Katz. *See* Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D.Pa.1971). The form of notice is reproduced at 53 F.R.D. 547. The district court simultaneously certified that the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. A panel of this court permitted an appeal to be taken.

Appealability of Rule 23(b)(3) Orders

We are met at the outset with the contention that the appeal should be dismissed because permission to appeal pursuant to 28 U.S.C. § 1292(b) was improvidently granted, in that an appeal under that section is not appropriate to

review a district court's favorable class action determination under rule 23(a) and 23(b)(3). That contention is based upon a misapprehension of the intended purpose of the Interlocutory Appeals Act and a misunderstanding of the role of the district court judge in granting or denying leave to proceed as a class action under rule 23(b)(3).

A class action determination, affirmative or negative, is not in this circuit a final order appealable under 28 U.S.C. § 1291. Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L. Ed.2d 812 (1972). *Compare id. with* Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967). If a district court denies class action treatment, even on discretionary grounds, and certifies, pursuant to rule 54(b), that the order dismissing the complaint against the absent class members is a final judgment, such an order is appealable. *See* Hayes v. Sealtest Foods Division of National Dairy Products Corp., 396 F.2d 448 (3d Cir. 1968). But rule 54(b) does not provide a means for reviewing the grant of class action treatment. If the court in entering a class action order acts outside its jurisdiction, Shutte v. Armco Steel Corp., 431 F.2d 22 (3d Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971), or in disregard of appropriate procedural safeguards, Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962), the order may be reviewable by mandamus. But if the court has acted within its jurisdiction pursuant to appropriate procedural safeguards and in a nonarbitrary manner, mandamus will not lie. Solomon v. Continental American Life Insurance Co., 472 F.2d 1043, 1046 (3d Cir. 1973);

Hackett v. General Host Corp., *supra*, 455 F.2d at 626; Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770, 775 (2d Cir. 1972); Interpace Corp. v. City of Phildelphia, 438 F.2d 401, 404 (3d Cir. 1971). Thus if there is any route open for the interlocutory review of the grant of class action treatment under rule 23(b) in this circuit, it is only pursuant to 28 U.S.C. § 1292(b).

We have, in Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 734 (3d Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1190, 28 L.Ed.2d 323 (1971), in an appeal pursuant to § 1292(b), reviewed and reversed the grant of class action treatment. *See also* Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336 (10th Cir. 1973), Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972), aff'd. 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), and Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969), affirming the denial of class action motions on § 1292 appeal. Obviously, then, some class action determinations are reviewable under § 1292(b).

Both Kauffman v. Dreyfus Fund, Inc. and Zahn v. International Paper Co. are arguably distinguishable from this case, however, since both involved nondiscretionary reasons for rejecting class action treatment. In *Kauffman* the plaintiff, not being a member of the class, could not be a class representative. *See* 434 F.2d at 734. In *Zahn* the issue was whether each of the class members had to meet the jurisdictional amount requirement to bring his claim within the district court's subject matter jurisdiction. The contention against appealability in this case is that because the district court's decision allowing the

case to proceed as a class action in contrast with *Kauffman* and *Zahn* involved the exercise of discretion, an appeal under § 1292 should not lie. Two circuit courts have in § 1292(b) appeals reviewed those aspects of a district court's class action determination which involve some exercise of discretion. Wilcox v. Commerce Bank of Kansas City, *supra*; Johnson v. Georgia Highway Express, Inc., *supra*. In fact in Wilcox, without discussing the appropriateness of its review, the Eighth Circuit examined one of the issues before us, the superiority of a rule 23(b)(3) class action for adjudication of a TILA claim. It found that the district court acted within its sound discretion in denying the motion.

The source of the contention that discretionary aspects of a rule 23 determination are not reviewable in a § 1292(b) appeal may be traced to language in cases such as Standard v. Stoll Packing Corp., 315 F.2d 626 (3d Cir. 1963), holding that a grant of or refusal to grant a change of venue authorized by 28 U.S.C. § 1404(a) will not be reviewed under § 1292(b). *See* A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439, 443 (2d Cir. 1966); *cf.* Akers v. Norfolk & Western Railway, 378 F.2d 78, 79 (4th Cir. 1967). Some commentators, relying on the change of venue authorities, have suggested that matters entrusted to the discretion of the district court are not properly reviewable in a § 1292 (b) appeal. *See, e.g.*, 9 Moore's Federal Practice ¶ 110.22 [2], at 261 (2d ed. 1973); C. Wright, Law of Federal Courts § 102, at 463 (2d ed. 1970). But to extrapolate from the change of venue cases, or even from the commentators' discussion of those cases, a general rule that no district court order involving some exercise of discretion may be re-

viewed in a § 1292(b) appeal is to misread that statute and to disregard its legislative history.

Section 1292(b) was the result of dissatisfaction with the prolongation of litigation and with harm to litigants uncorrectable on appeal from a final judgment which sometimes resulted from strict application of the federal final judgment rule. In the federal courts prior to 1891 no interlocutory appeals were possible. In that year Congress authorized interlocutory appeals from orders granting or continuing injunctions. Act of March 3, 1891, ch. 517, § 7, 26 Stat. 828. In 1895 it authorized interlocutory appeals from the denial of injunctive relief. Act of Feb. 18, 1895, ch. 96, 28 Stat. 666 (repealed, Act of June 6, 1900, ch. 803, 31 Stat. 660; reenacted, Act of March 3, 1911, § 129, 36 Stat. 1134). In 1900 it included orders in receivership cases. Act of June 6, 1900, ch. 803, 31 Stat. 660. In 1926 it included orders determining liability in admiralty cases prior to the assessment of damages. Act of April 3, 1926, ch. 102, 44 Stat. 233. In 1927 it included orders adjudging infringement in patent cases before an accounting. Act of Feb. 28, 1927, ch. 228, 44 Stat. 1261.[3] These four exceptions to the final judgment rule are included in § 1292(a). All four were in effect when the Judicial Conference of the United States began its consideration of broadening the availability of interlocutory appellate review. That consideration began with a suggestion by Judge Jerome Frank to the 1951 meeting of the Judicial Conference of the United States, which referred the matter to a committee chaired by Judge John J. Parker. Although Judge Frank's par-

[3] Interlocutory appeals under the Bankruptcy Act of 1898 are treated separately in title 11. See 11 U.S.C. § 47.

ticular proposal was rejected, after extensive investigation the committee reported in favor of a draft statute in the form of § 1292(b) and the Judicial Conference approved the report at its 1953 meeting. The draft statute was transmitted to the House of Representatives in 1957. *See* 3 U.S. Code Cong. & Admin. News, 85th Cong., 2d Sess., pp. 5258-5263 (1958). Judge Parker and Judge Albert B. Maris testified in its support. *See* Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R.6238, 85th Cong., 2d Sess., ser. 11 (1958) (hereinafter *House Hearings*). Since the bill was enacted exactly as submitted, the Judicial Conference Committee Report and the testimony of representatives of the Judicial Conference before Congress as to what they were attempting to accomplish are the best indication of the legislative intention.

In assessing both the text of § 1292(b) and its legislative history, it must be kept in mind that the draftsmen were not writing on a blank slate. Congress had already, in the four exceptions now embodied in § 1292(a), expressed certain value judgments as to when there should be a departure from the final judgment rule. In the case of grants or denials of injunctive relief or grants or denials of applications for the appointment of receivers, it had focused upon the problem of serious harm to the litigant pendente lite from an erroneous interlocutory order. In the admiralty and patent exceptions it had focused upon avoiding the wasted effort of a possibly protracted litigation over damages where there might be no liability.[4] Thus the draftsmen knew what considerations had historically moved

[4] The admiralty exception also involves potential harm pendente lite to the libelant from having to post security in order to obtain release of the vessel.

Congress toward relaxation of the final judgment rule. Those historical categories obviously bear upon the interpretation of § 1292(b). The section probably was intended to include orders having similar potential for harm to the litigant pendente lite or similar potential for causing a wasted protracted trial if it could early be determined that there might be no liability. That at least the latter potential was a major concern of the draftsmen is borne out by the examples given in support of the bill by its proponents. They referred specifically to cases in which a long trial results from a pretrial order erroneously overruling a defense going to the right to maintain the action, to cases involving prolonged assessment of damages after determination of liability, to cases where the disposition of motions for impleader might induce voluntary nonsuit or settlement, and to cases where venue is claimed to have been transferred without proper authority. *House Hearings* at 8, 9.

The statute imposes three criteria for the district court's exercise of discretion to grant a § 1292(b) certificate. The order must (1) involve a "controlling question of law," (2) offer "substantial ground for difference of opinion" as to its correctness, and (3) if appealed immediately "materially advance the ultimate termination of the litigation." Significantly, while the district judge must certify that the order satisfies the three criteria, the discretion to grant leave to appeal at the circuit level is not limited by any specific criteria. Judge Maris, testifying in support of the bill, analogized the appellate court's discretion to that of the Supreme Court on certiorari. *House Hearings* at 21. Denial of permission to appeal may be based upon a different assessment than that of the dis-

trict court as to any of the three criteria. But leave to appeal may be denied for entirely unrelated reasons such as the state of the appellate docket or the desire to have a full record before considering the disputed legal issue. And once leave to appeal is granted the court of appeals is not restricted to a decision of the question of law which in the district judge's view was controlling. Johnson v. Alldredge, 488 F.2d 820 (3d Cir. 1973).

There can be little difficulty over the criterion of difference of opinion as to correctness of the order. The likelihood is remote that a district judge would make such a certification frivolously with respect to his own order. Certainly the instant case involves an order over which a difference of opinion might exist since it took two district court opinions to arrive at a decision. Nor can there be much difficulty over the requirement of a likelihood of materially advancing the ultimate termination of the litigation. The district court's opinion about settlement possibilities, about the potential length of a possibly avoidable trial, and similar matters, will in most cases, including this case, be at least as informed as that of a panel of this court. The "controlling question of law" requirement is the source of whatever difficulty may arise as to the propriety of an interlocutory appeal.

A controlling question of law must encompass at the very least every order which, if erroneous, would be reversible error on final appeal. If the statute were interpreted to exclude any such order that interpretation would be inconsistent with the clear intention of the sponsors to avoid a wasted trial. Nor need the order be determinative of any plaintiff's claim on the merits, since a

dismissal for want of jurisdiction is within § 1292(b). Zahn v. International Paper Co., *supra;* S.Rep.No.2434, 85th Cong., 2d Sess. 2 (1958) (reprinted in 3 U.S.Code Cong. & Admin.News, p. 5256 (1958)). Nor need a reversal of the order terminate the litigation, since with impleader and transfer of venue orders, two of the sponsors' examples,[5] the lawsuit could continue regardless of the interlocutory determination although an erroneous decision might cause a reversal on appeal from a final order. What remains is the question whether in order for a question to be "controlling" must it be one which if decided erroneously would lead to a reversal on appeal? Certainly Judge Maris, testifying in favor of the bill on behalf of the Judicial Conference, did not think so. His testimony suggests that "controlling" means serious to the conduct of the litigation, either practically or legally. *House Hearings* at 21; *see* Note, Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour through Section 1292(b) of the Judicial Code, 69 Yale L. J. 333, 343 (1959). And on the practical level, saving of time of the district court and of expense to the litigants was deemed by the sponsors to be a highly relevant factor. See S.Rep.No.2434, 85th Cong., 2d Sess. 2 (1958) (reprinted in 3 U.S.Code Cong. & Admin.News, p. 5256 (1958)).

The clear case of a controlling question of law—one which would result in a reversal of a judgment after final hearing—serves to focus upon the limited precedential value of statements about the exercise of discretion appearing in § 1292(b) cases dealing with orders granting a change of venue. If an order changes venue to a place

[5] *House Hearings* at 9.

where there would be no jurisdiction, no discretion is involved and the certain reversal of the judgment on jurisdictional grounds after trial should be avoided. *See* 28 U.S.C. § 1404(a); *cf.* Swindell-Dressler Corp. v. Dumbauld, *supra*. If there are two districts, either of which would have jurisdiction, but one of which is in the opinion of the district court superior, it is extremely unlikely that a change of venue would result in a reversal after final judgment. As to most such orders it matters little whether one says that they do not decide a controlling question of law or that their review will not materially advance the litigation. However they are decided the litigation will go forward and a resulting final judgment will not, on the basis of the order, be disturbed on appeal. But a district court could so abuse the discretion vested in it by 28 U.S.C. § 1404(a) as to commit error reversible after final judgment. It could, for example, in a case in which credibility of witnesses was crucial, transfer to a venue in which the critical witness on one side was beyond the reach of a subpoena and available for testimony only by deposition. That would be an exercise of discretion. It might also be a ground for the grant of a new trial after final hearing. Obviously such a result should be preventable by a § 1292(b) appeal if the district judge anticipating the problem certified the change of venue order for interlocutory appeal. The key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal. The determination of what orders are properly reviewable under § 1292(b) must be made by a practical application of those policies, not by a mechanical application of labels such as "discretionary" or "nondiscretionary." Those

policies, both before and since the enactment of § 1292(b) have included the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense. In this case, as subsequent discussion will disclose, there exists by virtue of the order appealed from both the possibility of prejudice to a party pendente lite and the possibility of considerable avoidable wasted trial time and litigation expense.

Commentators on the rule 23 amendments support the view that appeals certified pursuant to § 1292(b) are appropriate for testing whether suitability of class action treatment has been correctly determined. *See* Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv.L.Rev. 356, 390 n.131 (1967); Report of the American Bar Association Special Committee on Federal Rules of Procedure, 38 F.R.D. 95, 104-105 (1965). As the foregoing discussion indicates, we agree with that view. The order appealed from is properly before us.

Scope of Review

There remains the question of scope of review of rule 23 class action determinations. That will depend to some extent upon which facet of the multi-faceted determination is challenged on appeal. The district court must determine if the four prerequisites for a class action listed in rule 23(a) have been met. These are mandatory requirements, and our review decides whether the mandates have been met. *E.g.*, Kauffman v. Dreyfus Fund, Inc., *supra; cf.* Zahn v. International Paper Co., *supra.* The district court must also determine whether the class action is main-

tainable under rule 23(b)(1) or (2) so that it may proceed without notice to or identification of the class members. Our review will determine whether the court properly classified the type of class action in reaching its decision as to class action treatment. *E.g.*, Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972). If the class action is maintainable only under rule 23(b)(3) the district court must make two additional findings: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Both findings require the exercise of an informed judgment as to the application of defined legal standards.

The predominance finding requires at a minimum the identification of the legal and factual issues, common and diverse, and an identification of the class members to which those relate. We must determine whether the district court has properly identified the factual or legal issues, and has properly identified those which are common. If the district court has properly identified the issues common and diverse, we would undoubtedly defer in most instances to its conclusion as to predominance, since that requirement relates to the conservation of litigation effort, and the trial court's judgment probably will be as good as ours. If the district court has applied the correct criteria to the facts of the case, then, it is fair to say that we will ordinarily defer to its exercise of discretion. But if it has not properly identified the issues, and not properly evaluated which are common, the order is not entitled to such deference.

The superiority finding requires at a minimum (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method. Since, as will be pointed out hereinafter, a single case resulting in a judgment which will be given collateral estoppel effect against a losing defendant is in most rule 23(b)(3) class actions an alternative available method, the comparative fairness and comparative efficiency of that method must be considered. As with the determination of predominance, our review looks first at whether the district court properly applied the relevant criteria to the facts of the case. If this has been done it is fair to say that we will ordinarily defer to its exercise of discretion. But if, for example, the district court has in rejecting alternative available methods of adjudication disregarded possible unfairness of the class action to a particular defendant, its determination is not entitled to such deference. *See* Wilcox v. Commerce Bank of Kansas City, 474 F.2d at 339 & n. 7.

Professor Moore summarizes the scope of review:

> "In determining whether an action brought as a class action is to be so maintained the trial court should carefully apply the criteria, set forth in Rule 23 . . ., to the facts in the case; and if it fails to do so its determination is subject to reversal by the appellate court when the issue is properly before the latter court. On the other hand, where the trial court does apply the Rule's criteria to the facts of the case, the trial court has broad discretion in determining whether the action may be maintained as a class action and its determi-

nation should be given great respect by a reviewing court." 3B Moore's Federal Practice ¶ 23.50 at 1104-05 (2d ed. 1969).

Cf. Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3d Cir. 1973).

Carte Blanche's Objections to Class Action Treatment

Carte Blanche urges that the district court erred both in its finding of superiority and in its findings of predominance. It points out, and Katz concedes,[6] that the claim that Carte Blanche's $15.00 annual fee is an improperly disclosed finance charge is of extremely doubtful validity. Yet the order appealed from directs that notice of this claim be sent to all of its card holders with the suggestion that they may be able to recover the $100 minimum recovery specified in 15 U.S.C. § 1640(a)(1). Carte Blanche points out that almost all of its card holders are also its account debtors, and it foresees the effect, possibly catastrophic to it, that a substantial number of the account

[6] Appellee's Brief in Reply to Petition for Rehearing at 3:

"The claim of that class is that Carte Blanche's $15.00 annual fee constitutes an improperly disclosed finance charge within the meaning of Truth in Lending. Events which have transpired since this litigation was commenced and since the trial court's determination, make it a near certainty that no liability will be imposed with respect to that claim. The Federal Reserve Board, the agency charged with administration of the Act and with rule making power, has issued an interpretation declaring such charges not to be finance charges. Subsequent to granting the Motion For Determination of Class Action, the trial court has made it abundantly clear in this and other litigation that it intends to follow that interpretation. Only the failure of the trial and appellate courts to accept the interpretation could conceivably result in the enormous liability upon which Carte Blanche bases its argument."

debtors will upon receipt of the notice withhold payments. It points out, as well, that at any given time a good many of its account debtors are delinquent entirely apart from delinquency induced by a class action notice. As to these account debtors, if after notice they fail to opt out, Carte Blanche will be required under Rule 13(a) of the Federal Rules of Civil Procedure to file a compulsory counterclaim. This course, it urges, would be disruptive of its normal collection practices and of its relations with its account debtors. All those disruptive effects, it urges, will take place even if it prevails in establishing its own full compliance with TILA. It urges that the district court, in making its superiority determination, disregarded these substantial elements of unfairness to it. And the court also disregarded the fact that Congress has afforded to individual litigants a remedy of attorneys fees if they are relegated to individual lawsuits, thus making such relegation not unfair to the individual class members. Moreover, it contends the district court erred in making its predominance finding, since as to each alleged class member it will be entitled to a hearing on the fundamental liability issue of whether the challenged finance charge was imposed in connection with a consumer rather than a business transaction. These individual factual issues, it is urged, heavily predominate over the legal and factual issues relating to Carte Blanche's conduct.

The Test Case as an Available Alternative Method.

In rejecting Carte Blanche's contention that notice should not be given to its account debtors until its noncompliance with TILA disclosure requirements had been established,

the district court discussed and rejected the test case as an available alternative, writing:

> "Some confusion surrounded the meaning of the term test case. A classic test case with binding legal effects on all those affected by its outcome is not possible, of course, without the express consent of all those affected, both parties and non-parties. In the case *sub judice* in which the obtaining of the express consent of non-nominal parties is an impracticability, the procedural device by which to bind all non-nominal parties to the outcome of the case is the class action.[3] The term test case as applicable here, therefore, means a test case for practical purposes. In other words, if the plaintiff's motion for determination of a class action is denied the instant action becomes, in practical effect, a case not legally binding upon anyone other than Mr. Katz, and it is the superiority of that alternative which we must evaluate.

[3] Since our circuit has decided that an action proposed as a class action shall proceed as a class action unless and until it is determined otherwise, all members of the proposed class are more properly non-nominal parties than non-parties. See Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970)." 53 F.R.D. at 540-541.

There is in Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970), language similar to the district court's footnote 3, but in the footnote it is taken out of context. We said in Kahan v. Rosenstiel that an alleged class action should be treated as such for purposes of dismissal or compromise until there is a full determination that a class action is not maintainable. We did not, as the district judge apparently believed, rule in Kahan v. Rosenstiel on the question when in a rule 23(b)(3) case the class action determination must be made. Rule 23(c)(1) provides that the determination should be made as soon as practicable after the commencement of the action. But "[a]s soon as

practicable" must mean as soon as practicable in the light of the relevant rule 23(b)(3) factors of predominance and superiority. Where the defendant seeks a postponement of that determination on the ground of fairness, as soon as practicable does not necessarily mean at the outset of the lawsuit.

The district court points out that if Katz' case went forward alone it would not be binding upon anyone other than Mr. Katz. That is only partly true. Judgment against Katz would not protect Carte Blanche against other class members, but judgment for Katz would bind Carte Blanche in suits by other class members. In making its superiority determination the district court overlooked that factor, and disregarded the fact that Carte Blanche was content to take its chances on stare decisis rather than res judicata. No reference was made to the Supreme Court's decision in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), or to the well-developed jurisprudence in this circuit flowing from Judge Hastie's well-known decision in Bruszewski v. United States, 181 F.2d 419 (3d Cir.), cert. denied, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950). To understand the relevance of *Blonder-Tongue* and *Bruszewski* to the superiority finding one must start with a consideration of case law under the old rule 23. Prior to the 1966 amendments, cases which would now be covered by rule 23(b)(3) were commonly referred to as spurious. In York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), Judge Frank for the Second Circuit and in Pentland v. Dravo Corp., 152 F.2d 851, 856 (3d Cir. 1945), Judge Goodrich for this court suggested that it would be proper to

make the class action determination and permit class members to intervene after the defendant's liability had been determined in the single lawsuit. In Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 588-589 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1963), the Tenth Circuit held that such "one-way" intervention after a judgment adverse to the defendant was proper. Many commentators objected that one-way intervention had the effect of giving collateral estoppel effect to the judgment of liability in a case where the estoppel was not mutual. This was thought to be unfair to the defendant. To meet the point that one-way intervention was unfair to the defendant, the Advisory Committee on the Federal Rules concluded that class members should be brought in prior to the determination of defendant's liability, thus making the estoppel mutual. *See* Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 105 (1966); Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1), 81 Harv.L.Rev. 356, 385 (1967). To make joinder at an early stage practically achievable, the "opting out" mechanism was devised. The literature on the development of rule 23(b)(3) makes it quite clear that the early notice requirement was directly related to dissatisfaction with the lack of mutuality of the estoppel which resulted from the *York, Pentland, Nisley* rule.

Of course the 1966 amendment to rule 23(b)(3) was also based upon the underlying assumption that class action disposition of multiple similar claims, especially small consumer claims, is socially desirable. But the socially desirable effects, looked at from the point of view of anyone other

than the defendant, were as achievable under the *York, Pentland, Nisley* rule as under a rule prohibiting one-way intervention. A major social policy in favor of the § 23(b)(3) class action is the prevention of multiple relitigation of the factual and legal issues as to a defendant's liability. The *Nisley* result accommodated that policy perfectly in any case where liability was established. In cases where the defendant prevailed, other class members were, of course, free to try again. But practically speaking, stare decisis provided a substantial deterrent in most instances. Another major social policy in favor of the § 23(b)(3) class action is its encouragement of private enforcement on behalf of small claimants. Again the *Nisley* result accommodated that policy, since notice could be given to all potential claimants once the defendant's liability was established. Moreover a fee award could be made in light of the value of the benefit conferred on the entire class. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); Kahan v. Rosenstiel, *supra*. The objection to the *Nisley* result was not any conflict with the policies favoring class action litigation, but a conflict with Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 32 S.Ct. 641, 56 L.Ed. 1009 (1912). That case had announced "[i]t is a principle of general elementary law that the —estoppel of a judgment must be mutual." *Id.* at 127, 32 S.Ct. at 642. Judge Hastie by 1950 in *Bruszewski* did not think the principle was quite so elementary as it had seemed in 1912. In 1970 the Supreme Court unanimously rejected the authority of the *Bigelow* case. Blonder-Tongue v. University of Illinois, *supra*. *Ratio est legis anima; mutata legis ratione mutatur et lex.*

In this case Carte Blanche seeks not to have conferred upon it what it perceives to be the dubious benefit of mutual estoppel. It is perfectly willing to run the risk that if it loses the class may later be enlarged rather than, as Katz suggests, contracted.[7] We think the *Blonder-Tongue* decision requires that a new look be taken at the alternative of a test case in lieu of an early class action determination. That new look must, as with all rule 23(b)(3) superiority determinations, take into account several different interests. Superiority must be looked at from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant. The listing is not necessarily in order of importance of the respective interests. Superiority must also be looked at from the point of view of the issues.

Turning to the issues in this case there is legally and factually a clear line between the question whether Carte Blanche has made the disclosures required by TILA and the question whether any given card holder is a consumer or a business user. Whether or not class action treatment is given at the outset, the judicial system will not, since the *Blonder-Tongue* case, be required to relitigate after a finding that Carte Blanche did not make the required disclosures. If there is a finding for the defendant on liability, the judicial system will be protected from relitigation of the essentially legal issue of compliance with TILA

[7] Any problem arising out of the doubt expressed by Judge Seitz as to the extent of the demise of mutuality of estoppel can be resolved by conditioning postponement of notice upon the filing of an appropriate stipulation by the defendant agreeing to be bound in favor of potential class members by an adverse determination of liability.

regulations by the discouragement of relitigation afforded by stare decisis. Where, as here, the defendant makes a nonfrivolous claim that—it will be prejudiced by the mailing of notice, it is hardly fair to say that the judicial system must insist on res judicata rather than collateral estoppel or stare decisis. Especially is this so when it is recalled that the plaintiff, not the judicial system, controls whether or not to ask for class action treatment. As to the issues relating to consumer versus business use, a postponement of those issues until violation is decided will actually protect the judicial system from time and expense which might have been wasted on them in a nonliability case. Moreover the judicial system may, by postponing class action treatment until a violation has been proved, avoid whatever time and expense it, as distinguished from the parties, might have incurred in the preparation of the notice.

Postponement of class action determination until the violation has been proved in no way prejudices the potential class members. If Katz loses his case on violation they will not be bound. If Katz establishes the violation they can be afforded the same opting out option, but the notice will advise them that there is a judgment establishing violation, and their decision will be more informed than if the notice was sent early in the proceedings. The only real potential for harm to the absent class members, the running of the statute of limitations, once thought to be a possible problem, has been eliminated by the holding in American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), that the filing of a class action complaint tolls the running of the statute of limitations for the entire class. The Court has thus adopted the

same holding of the Tenth Circuit in the *Nisley* case. It might be suggested that the seventh amendment gives the absent class members a right to a unitary trial as to all issues of liability and damages before a single jury. This can hardly be the case as to the absent class members, however, since it is under rule 23 discretionary with the court whether they will be included in the case at all. If the seventh amendment presents any problem at all, it is a problem related to the rights of the defendant. And more practically, even the order appealed from contemplates a nonunitary determination of liability and damage issues relating to the individual class members.

As to the original plaintiff, Katz, he is not affected with respect to the amount of his recovery or with respect to the trial of the case. He may be protected from the expense, in this case $37,500, of mailing out a notice to parties who have no rights. If he first establishes a violation, the district court may conclude that the defendant rather than he should bear the initial cost of the mailing. The only possible adverse effect upon him of postponing the class action determination until after he proves a violation is that it may be more difficult for him to obtain an attorney willing to pursue his claim. Further reference will be made to the effect of postponing the class action determination upon the willingness of attorneys to undertake such cases in the next paragraph. Here, we point out that in TILA Congress has provided for the award of reasonable attorneys fees. 15 U.S.C. § 1640(a)(2). It seems unlikely that actions under TILA or any other federal regulatory statute providing for the award of reasonable attorneys fees are likely to go begging for want of an attorney.

We have no doubt that the maximization of potential recoveries in a single lawsuit which has resulted from the 1966 amendments to rule 23 has produced the desirable effect of interesting outstanding attorneys in the pursuit of consumer protection lawsuits. The encouragement of that interest is a legitimate consideration in the district courts' administration of rule 23(b)(3). It is not, however, the sole consideration. Fairness is an explicit criterion for a superiority determination, and fairness to the defendant must be balanced against any disincentive for class action litigation which might result from the possibility of postponing the class action determination until a violation has been proved. The major incentive to the bar is the possibility of aggregating small claims. That incentive is no different, since the same class members will be opted in once a violation has been proved, and the attorney's fee will be measured to the same extent as heretofore by the benefit conferred upon the class. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., *supra;* Kahan v. Rosenstiel, *supra.* Another incentive to the bar is the increased settlement leverage which results from aggregating small claims. That incentive is no different, for the potential for aggregation if a violation is proved still remains, and the defendants will be under no less compulsion to make a settlement offer to the class, when confronted with a legitimate claim of violation, than in the past. Indeed we have observed that not infrequently settlement negotiations do precede class action determinations. *See* Greenfield v. Villager Industries, Inc., *supra.* What the attorneys would be deprived of by postponement of class action determination until a violation has been proved is the additional settle-

ment leverage which results from the disruption or injury which may occur to a defendant's business relationships regardless of the merits of the claim by the mere sending of the notice. That leverage is said by the instant defendants to be considerable. It is, we think, less than a legitimate use of a procedural device. If its absence provides some disincentive to attorneys' pursuit of class actions, that disincentive must be tolerated in the interest of fairness.

The public at large has an interest in the fact that the class action device provides supplementary enforcement of regulatory statutes. What we have said about disincentives to attorneys' pursuit of those actions applies as well to the public interest. There is incentive enough in the possibility of aggregating small claims without adding to the leverage resulting from aggregation any untoward effects resulting from notice in possibly groundless actions.

Finally, turning to the defendant's interest, it must be understood that we are dealing only with the defendant who declines the protection against one-way intervention after a violation has been proved which rule 23(b)(3) was designed to afford. If a class action defendant insists upon early class action determination and notice, he is, under the rule, entitled to it. But where he makes a nonfrivolous claim that his business will be harmed or disrupted by the notice, and is willing to run the risk that the determination of liability, if he loses, will be given effect in favor of the class, with notice in the event of such determination, the district court must seriously consider that alternative, and should, absent other compelling circumstances, pursue that course. A defend-

ant taking such a position would, of course, be deemed to have waived any seventh amendment right to a unitary trial before a single jury on all issues, and would realize that the statute of limitations was tolled in favor of the class. He would lose, as well, the collateral estoppel effect against the class of a favorable judgment on liability.[8]

Manageability.

As a separate ground of appeal Carte Blanche contends that the district court erred in concluding that it could manage the problem of determining, separately as to each, which of 800,000 potential class members were nonbusiness credit card users. Although the literature and case law under rule 23 often refer to a finding of "manageability" as a separate requirement for a class action determination, it is actually one of the nonexclusive factors which is to be taken into account in making the required findings of predominance and superiority. We have concluded that the order appealed from must be reversed because the superiority finding was in error. With the procedure we have suggested, the class, if any, ultimately to be included and receive notice may be considerably

[8] We do not in this case decide whether, if the basis for federal jurisdiction is solely diversity, the cause of action arises under state law, and the applicable state law requires mutuality of estoppel, the class action determination may be postponed and late opting is permitted. *Compare* Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), *with* Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). *Cf.* Guffey v. Smith, 237 U.S. 101, 35 S.Ct. 526, 59 L.Ed. 856 (1915). Such class actions are comparatively rare. *But see* Zahn v. International Paper Co., *supra*. Early notice in many diversity cases may have no adverse effects on the defendant. Moreover *Blonder-Tongue* probably will be followed in the future by many states which have not yet abandoned the mutuality of estoppel requirement.

smaller than 800,000. The management problem later in the case may be considerably different than appears at this juncture since at a later stage the content of the notice may be considerably more specific. If suffices to say at this point that determining which of 800,000 claimants was a consumer rather than a businessman, if the defendant chooses, as it may, to insist on proof as to each, appears on the surface to present formidable management problems and will undoubtedly be reconsidered if the district court concludes that Katz has proved all three claimed violations.[9]

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[9] We note that of the 51 district courts considering motions for class actions under TILA, 40 have denied such motions while only 11, including the district court in this case, have permitted a class action to proceed. Denied: Mourning v. Family Publications Serv. Inc., Civ.No. 70-559 (S.D.Fla. Nov. 27, 1970); Allerton v. Century Credit Corp., Civ.No. 70-1614 (S.D.Fla. Nov. 27, 1970); Buford v. American Fin. Co., 333 F.Supp. 1243 (N.D.Ga.1971); Ratner v. Chem. Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y.1972); Gerlach v. Allstate Co., 338 F.Supp. 642 (S.D.Fla.1972); Rogers v. Coburn Fin. Corp., 54 F.R.D. 417 (N.D.Ga.1972), modifying 53 F.R.D. 182 (N.D. Ga.1971); Kenney v. Landis Financial Group, Inc., 349 F.Supp. 939 (N.D.Iowa 1972); Shields v. Valley Nat'l Bank, 56 F.R.D. 448 (D.Ariz.1971); Wilcox v. Commerce Bank, 55 F.R.D. 134 (D.Kan. 1972), aff'd 474 F.2d 336 (10th Cir. 1973); Roesel v. Fulton Nat'l Bank, Civ.No. 15376 (N.D. Ga., May 25, 1972); Grubb v. Dollar Loan Co., Civ.Nos. 15550, 15976 (N.D.Ga., May 25, 1972); Shields v. First Nat'l Bank, 56 F.R.D. 442 (D.Ariz.1972); Greer v. Sears, Roebuck & Co., Civ.No. 72-80 (S.D.W.Va., July 3, 1972); Kriger v. European Health Spa., Inc., 56 F.R.D. 104 (E.D.Wis.1972); Boggs v. Alto Trailer Sales, Inc., Civ.No. 71-1271 (E.D.La., Aug. 7, 1972); Haynes v. Logan Furniture Mart, Inc., Civ.No. 70-C-1827 (N.D.Ill., Sept. 20, 1972); Goldman v. First Nat'l Bank, 56 F.R.D. 587 (N.D. Ill.1972); Johnson v. Austin Furniture, Inc., Civ.No. 72-C-724 (N.D. Ill., Oct. 10, 1972); Garza v. Chicago Health Clubs, Inc., 56 F.R.D. 548 (N.D.Ill.1972), modifying 329 F.Supp. 936 (N.D.Ill.1971); Rodriquez v. Family Publications Serv., Inc., 57 F.R.D. 189 (C.D.Cal. 1972); Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D.Cal. 1972); Mullen v. Montgomery Ward & Co., Inc., 57 F.R.D. 89

(Footnote continued on following page)

Class Actions and the Truth in Lending Act

Carte Blanche urges as an additional objection to the district court's order that in enacting 15 U.S.C. § 1640(a) and in particular the penalty provision in § 1640

(Footnote continued from preceding page)

(N.D.Cal.1972); Kroll v. Cities Serv. Oil Co., 352 F.Supp. 357 (N.D. Ill.1972); Hunter v. Gross Bros. Furniture Inc., Civ.No. C-71-2443 (N.D.Cal., Dec. 20, 1972); Winston v. Nat'l Bank of Commerce, Civ.No. 71-1986 (E.D.La., Feb. 9, 1973); Berkman v. Sinclair Oil Corp., 59 F.R.D. 602 (N.D.Ill.1973); Roth v. Community Nat'l Bank, Civ.No. C-72-1031 (N.D.Ohio, Mar. 13, 1973); Lindig v. City Nat'l Bank, 59 F.R.D. 154 (S.D.Ohio 1973); Coleman v. City Fin. Co., Inc., Civ.No. 72-685-K (D.Md., Mar. 27, 1973); Hollis v. Tucker, Civ.No. 72-735-K (D.Md., Mar. 27, 1973); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7 (D.D.C.1973); Pennino v. Morris Kirschman & Co., Inc., Civ.No. 72-1339 (E.D.La., Apr. 27, 1973); Altenbach v. Francis Ford, Inc., Civ.No. 72-963 (D.Or., Apr. 30, 1973); Steelreath v. American Nat'l Bank & Trust Co., Civ.No. 6799-71-P (S.D.Ala., May 23, 1973); Griffin v. First Nat'l Bank, Civ.No. 6800-71-P (S.D.Ala., May 23, 1973); Hoffman v. Charnita, Inc., 58 F.R.D. 86 (M.D.Pa.1973); Alpert v. U. S. Indus., Inc., 59 F.R.D. 491 (C.D.Cal.1973); Richmond v. Railey's Appliance Center, Inc., 59 F.R.D. 641 (E.D.Va.1973); Fisher v. First Nat'l Bank, Civ. Nos. 72-O-156, 82-O-157 (D.Neb., June 20, 1973); Turoff v. May Co., No. C71-948 (N.D.Ohio, July 23, 1973). Granted: Martin & Alexander v. Family Publications Serv., Inc., No. 5829 (D.Vt., June 30, 1970); Richardson v. Time Premium Co., Civ.No. 70-1814 (S.D.Fla., Feb. 4, 1971); Douglas v. Beneficial Fin. Co., 334 F.Supp. 1166 (D.Ala. 1971), rev'd on other grounds, 469 F.2d 453 (9th Cir. 1972); Smith v. International Magazine Serv. of Mid Atlantic, Inc., Civ.No. 71-16-F (N.D.W.Va., Oct. 29, 1971); Katz v. Carte Blanche Corp., 52 F.R.D. 510, 53 F.R.D. 539 (W.D.Pa.1971); Joseph v. Norman's Health Club, Inc., 336 F.Supp. 307 (D.Mo.1971); La Mar v. H & B Novelty & Loan Co., 55 F.R.D. 22 (D.Or.1972); Flickinger v. Horseshoe Dev. Corp., Civ.No. 11-334-C-1 (S.D.Iowa, March 10, 1972); Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99 (E.D.N.Y.1973); Eovaldi v. First Nat'l Bank, No. 71 C 1654 (N.D.Ill., June 15, 1973), modifying 57 F.R.D. 545 (N.D.Ill.1972); McDermott v. Hollander, 60 F.R.D. 643 (E.D.La.1973).

(a)(1), Congress intended that the penalty could be recovered only in an individual and not in a class action. It points to the attorneys fee provision in § 1640(a)(2) as suggesting such an interpretation. Neither of the district court opinions explicitly passed upon that contention. Carte Blanche urges, however, that it is implicit in the district court's superiority determination. It does not appear to have been decided even implicitly for, as Carte Blanche concedes in its petition for rehearing, there is no suggestion that Congress intended to prohibit the recovery of actual damages in a class action. The district court has not yet determined whether it will award statutory penalties as well as damages. Its superiority determination would have been no different on the assumption that class members might recover actual damages only. Our reversal does not turn on the difference between actual damages and statutory penalties. We cannot exercise appellate jurisdiction over an issue not yet decided in the district court.

The order appealed from will be reversed and the case remanded to the district court for further proceedings consistent with this opinion.

SEITZ, Chief Judge (dissenting).

The unarticulated major premise of the majority decision is a distaste for class actions, at least in the present context. I do not believe such distaste, however widely shared, justifies judicial emasculation of Rule 23.

Appealability

This appeal comes to us pursuant to 28 U.S.C. § 1292(b) (1970). Section 1292(b) permits appeal of interlocutory

orders that involve "a controlling question of law as to which there is substantial ground for difference of opinion . . . [if] appeal from the order may materially advance the ultimate termination of the litigation . . . ." The majority correctly notes that the primary reason for allowing appeals under § 1292(b) is to avoid wasted trials and harm to the litigants. After a brief nod to the statute's terms, the majority completes its syllogism by stating that allowing appeal of class action determination orders can avoid wasted trials, therefore this order is appealable.

In turning to the statute's underlying policy for guidance, the majority has examined only the reason for expanding the availability of interlocutory appeals, and has ignored the countervailing considerations for allowing appeal of less than all interlocutory orders. If we take avoidance of wasted trials as our sole guide, a multitude of interlocutory orders become appealable. The draftsmen and proponents of § 1292(b), however, were of the view that it provided for review of interlocutory orders only in "exceptional" cases. See 1958 U.S. Code, Cong. & Admin.News, pp. 5255, 5259, 5260-5261. The draftsmen's desire to limit availability of such review to exceptional cases reflected another policy consideration underlying § 1292(b): need to avoid piecemeal review and its attendant delays and waste of time. *Id.* at pp. 5257, 5259, 5261-5263. As was noted in the letter accompanying the Judicial Conference's draft bill:

> It has always been recognized that there are two competing considerations bearing upon appeals from interlocutory orders. On the one hand too rigid a bar against such appeals . . . may result in injustice by preventing at an early stage the final decision of an issue which might be determinative of the case and burdening the parties with the expense of subsequent proceedings, perhaps prolonged, to no avail. On the

> other hand too great freedom in taking appeals from orders of the district court prior to the final judgment, "piecemeal appeals" as they are called, may make for delay and increase the expense of the litigation.

Id. at p. 5259.

Attempting to harmonize the competing considerations, the draftsmen required two courts to agree that an appeal was proper and limited the class of appealable orders to those involving questions of law, controlling the order, as to which there was substantial ground for difference of opinion. This limitation gives the chance for appeal before final judgment where a "clean" legal issue is involved, one as to which the controlling legal principles are in dispute but which does not require the appellate court to make fact determinations.

The majority takes great care in demonstrating that even orders involving the exercise of discretion are appealable. I quite agree. Yet that does not advance the majority's argument. For no one contends that orders involving the exercise of discretion cannot be appealed under § 1292(b). What numerous courts have stated, in ruling on appeals from a variety of orders, including inter-district transfers, is that appeals cannot be maintained under § 1292(b) to test the propriety of a district judge's exercise of discretion. E.g., United States v. Salter, 421 F.2d 1393, 1394 (1st Cir. 1970); Akers v. Norfolk & Western Railroad Co., 378 F.2d 78, 79 (4th Cir. 1967); J. C. Trahan Drilling Contractors, Inc. v. Sterling, 335 F.2d 65 (5th Cir. 1964); Phelps v. Burnham, 327 F.2d 812, 814 (2d Cir. 1964); Standard v. Stoll Packing Corp., 315 F.2d 626 (3d Cir. 1963). Were § 1292(b) available to review simply the exercise of discretion, appel-

late courts, prior to final judgment, would be engaged in the time-consuming weighing of facts that the section's drafters sought to avoid.

Yet an order involving the exercise of discretion may also involve a question of law that allows appeal under § 1292(b). Two transfer cases in the Second Circuit illustrate this point. In A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439 (2d Cir. 1966), the court stated that § 1292(b) was unavailable to review the district judge's exercise of discretion in evaluating certain factors supporting his order. *Id.* at 442-443. Just three years later, the court declared that transfer orders were appealable under § 1292 (b) where a question was raised concerning the district court's power to transfer. Farrell v. Wyatt, 408 F.2d 662, 664-665 (2d Cir. 1969).[1]

Were the order before us questioned solely on the grounds decided by the majority, that the district judge abused his discretion, it would not be appealable prior to final judgment. The order granting class status, however, involved another question: whether the Truth in Lending Act implicitly prohibits maintenance of class actions to enforce its provisions. This question is one of law, decision of which controls the order before us. I would find the order appealable on this ground.

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[1] Another illustration of this point is provided by Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). The appeal in *Johnson* was not simply on the ground that the district court abused its discretion in entering a class action determination order. Rather, the order appealed from in *Johnson*, in addition to restricting the class, in effect holding that plaintiff was not a proper class representative, denied a motion to strike defendant's demand for a jury trial. The availability of a jury trial was a controlling legal question allowing appeal of the order under § 1292(b).

Standard of Review

Although construction of the Truth in Lending Act presents the controlling question of law that makes the order appealable under § 1292(b), the Court of Appeals is instructed to decide the appeal, not merely the question making the order appealable. Johnson v. Alldredge, 488 F.2d 820, 822-823 (3d Cir. 1973). This approach recognizes that once an order is before the court, judicial economy mandates a complete decision of its propriety, including decision of questions that, if alone involved, would not render an order appealable. Thus, I agree with the majority that, unless the Truth in Lending Act bars any class action, we must determine whether the district judge abused his discretion in determining that this suit could be maintained as a class action.

My agreement with the majority, however, needs qualification, for the majority, while reviewing the district court's exercise of discretion, purports not to be concerned with it. The majority first fractures the district court's class action determination into a non-discretionary component, identification of the proper factors to be considered, and a discretionary component, evaluation of the factors; next, the majority elaborates the proper criteria and, still purporting to scrutinize the non-discretionary component of the class action determination, looks "at whether the district court properly applied the relevant criteria to the facts of the case" (which appears to be an examination of precisely the matter the majority identified as within the district court's discretion); finally, the majority reverses the district court for improperly finding a class action superior to other forms of proceeding, the reason for reversal being that postponement of the class action determination is

deemed by the majority superior to an affirmative class action determination.

My view of the matter is somewhat simpler. Rule 23(b)(3) of the Federal Rules of Civil Procedure requires the district judge to find that questions of law or fact common to the class predominate over questions relevant only to individual class members and that the class action is the superior form for resolution of some or all of the issues. The district court must exercise its informed discretion in making these findings and can be reversed as to the propriety of these findings only for abuse of discretion. Cypress v. Newport News General & Non-Sectarian Hospital Association, 375 F.2d 648, 653 (4th Cir. 1967) (in banc). To guide the district court in making these findings, the rule provides a "non-exclusive listing" of relevant considerations. Advisory Committee's Notes on Proposed Amendments to the Federal Rules of Civil Procedure, 39 F.R.D. 69, 103-104 (1966). These considerations, interest of class members in pursuing individual actions, extent of pending related litigation, desirability of concentrating proceedings in the forum court, and manageability of a class action, were taken into account by the district judge in his findings on superiority and predominance. Thus, according to the majority's authority for selection of its review standard, unless the judge abused his discretion, or the Truth in Lending Act bars this class action, his order should be affirmed. J. Moore, 3B Moore's Federal Practice, ¶ 23.50 (2d ed. 1969).

Superiority

The ground relied on by the majority in reversing the district court was superiority. I must disagree with the majority because I cannot say that the district judge

abused his discretion in finding a class action superior to other means for disposing of this litigation.

The district court's mistake, according to the majority, was its failure to perceive the benefits of postponing a class action determination until after a determination of Carte Blanche's liability. One stumbling block to the majority's approach is Rule 23(c)(1), which provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Considering this recent provision (1966) in the light of case law, developments, the majority decides that that portion of the rule no longer performs a useful function. The provision, the majority declares, was adopted to prevent "one-way intervention," distaste for which was bottomed on the requirement of mutuality of estoppel. The majority goes on to claim that the mutuality test was interred by the Supreme Court in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

Passing over the fact that the quoted language of the rule remains, there is some question as to the extent to which the reason has been changed. The Supreme Court's *Blonder-Tongue* decision does not appear to have killed mutuality outright, although the wound inflicted there may someday prove fatal. The Court was careful to note that *Blonder-Tongue* did not involve "offensive estoppel", that is, use, to establish liability, of "a judgment obtained by a different plaintiff in a prior suit against the same defendant." 402 U.S. at 329-330, 91 S.Ct. at 1443 [footnote omitted]. The attempted use of estoppel in *Blonder-Tongue* was to prevent a patent holder from suing on his patent after it had

been held invalid. After identifying the narrow issue before the Court and discussing the effect of the patent law on it, the Court examined the economic consequences of requiring mutuality in patent suits where patent invalidty was asserted as the defensive estoppel. *Id.* at 334-348, 91 S.Ct. 1434. The Court's abandonment of a mutuality requirement for the particular type of estoppel involved in *Blonder-Tongue* was based largely on its analysis of the cost of continued adherence to mutuality—that economic analysis makes up roughly one-half of the Court's opinion and emphasizes that "although patent trials are only a small portion of the total amount of litigation in the federal courts, they tend to be of disproportionate length." *Id.* at 348, 91 S.Ct. at 1452 [footnote omitted].

The majority does not analyze the economic consequences of continued adherence to the mutuality requirement in cases such as the one before us, nor does the majority face the peculiar difficulties often thought to inhere in "offensive" use of estoppel. Instead, the majority simply assumes that mutuality is no longer required for assertion of an estoppel for any purpose in any case.[2] On this unsturdy foundation, the majority builds its argument that it was error for the district court to make an affirmative class action determination at this stage of the proceedings.

To reach its desired result the majority makes a number of factual assumptions without any record basis. Among these questionable assumptions are: (1) that Carte Blanche's card holders will, no matter how clearly worded the notice,

[2] Professor Wright has expressed a view on this matter diametrically opposed to the position taken by the majority. He would not allow the offensive use of estoppel in class action situations even where there are no other limits on use of estoppel. C. Wright, Federal Courts 314 (2d ed. 1970).

withhold payments to Carte Blanche on learning of this suit; (2) that Carte Blanche will be harmed by assertion of compulsory counterclaims; (3) that a lawyer would take a $100 case if he could get "reasonable attorney's fees" if successful; and (4) that a lawyer of exceptional competence would be as likely to prosecute an individual action as a class action. The majority's reliance on such factual assumptions indicates the extent to which review for abuse of discretion requires fact evaluation—these evaluations are entrusted to the district court, and courts of appeals are not supposed to substitute their judgment for the district courts'. The majority's need to engage in fact evaluation and to rely for reversal on assumed facts, not found by the district court, also indicates why the exercise of discretion does not justify § 1292(b) review.

The end result of the majority's assumptions, some specific to this case and some general, is that, prior to judgment on liability, no order determining that a class action may be maintained is proper where (1) the defendant objects and (2) plaintiff can, if successful, recover reasonable attorney's fees. I do not read Rule 23 as limiting availability of class action treatment to the narrow class of cases not covered by the majority's rule. The district court has, after evaluating the factors listed in Rule 23(b) (3), found that a class action would be superior to other forms of proceeding. Since Carte Blanche has failed to demonstrate any abuse of the district court's discretion, I would not reverse the district court's order as based on a faulty superiority finding.

Carte Blanche does attack vigorously the district court's conclusion, supporting its superiority finding, that this suit would be manageable as a class action. The majority

does not reach the issue of manageability, at this state in the proceedings, of a class action. Carte Blanche contends that since only consumer credit, not business, uses of the company's card can serve as the basis for a Truth in Lending suit, the district court would first have to ascertain each plaintiff use of his card. I note that this examination of card use goes not to the legal issues connected with Katz' allegations of liability but to each plaintiff's entitlement to class membership.

So long as the class representative is a bona fide consumer user of the card, the use each purported class member makes of his card need not be determined before a determination on the controlling legal issues. The district court can, of course, make its class determination conditional and can modify its interim class determination at anytime during the proceedings. Fed.R.Civ.P. 23(c)(1). I would, therefore, reject Carte Blanche's argument that this suit is inherently unmanageable as a class action.

Predominance

The district court's finding that common issues of law or fact predominate is, like its superiority finding, judged by the abuse of discretion standard. The primary argument advanced by Carte Blanche in urging that the district court abused its discretion in finding that common questions are predominant is that individual consideration of each class member's card use is required. Rule 23(c)(4)(A) provides that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues, . . . and the provisions of this rule shall then be construed and applied accordingly." The Rules Committee, in adding this subsection, clearly indicated that class action treatment might be appropriate for resolution

of common questions even though other issues may have to be litigated individually. Advisory Committee's Notes, *supra* at 106.

Since the district court may treat the basic legal issue as to liability separately from determination of each individual's proper class membership, I would accept the district court's finding as to predominance.[3] Having abused its discretion neither in finding that a class action is superior to other means for resolution of the case nor in finding a predominance of common questions, the district court's order should be affirmed unless class action enforcement is forbidden by the Truth in Lending Act.

Truth in Lending

In light of my belief that the district court has not abused its discretion in its findings on predominance and superiority, I must reach Carte Blanche's contention that Congress intended that only individual suits be allowed for enforcement of the Truth in Lending Act (hereinafter "the Act"). This was Carte Blanche's principal argument before the panel that heard this case and also was argued on rehearing. The district court, however, did not explicitly reach this contention, and the majority declares that appellate

[3] While the district court elected to divide the class into subclasses under 23(c) (4) (B), rather than first to divide the suit by issues under 23(c) (4) (A), the availability of 23(c) (4) (A) for use by the district court makes graphic the difficulty with holding, before final judgment, that a court abused its discretion in finding predominance. The district judge noted in his opinion that he might utilize 23(c) (4) (A) in this case. 53 F.R.D. 539, 543 (E.D.Pa.1971). I note that if liability is found, the district judge may decide that the question of individual damage, as well as individual entitlement to recover as a consumer user of the card, is better left to individual proceedings.

jurisdiction cannot be exercised "over an issue not yet decided in the district court."

The majority's view of the scope of appellate review differs considerably from what I had thought to be the law on that subject. After making reviewable under § 1292(b) every interlocutory discretionary determination on class action status, the majority abstains from deciding an issue simply because it was not spoken to below. We review orders, rulings and judgments, not issues; any issue relevant to the order, ruling or judgment may be considered on appeal, so long as a party or the court has a right to raise it. Whether the issue was decided below is immaterial, given its relevance to some judicial action properly under review. Some issues, such as subject matter jurisdiction, may be raised on appeal by the court or even by the party who invoked the lower court's jurisdiction. See Brown Shoe Co. v. United States, 370 U.S. 294, 305-306, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S.Ct. 534, 95 L.Ed. 702 (1951). Other issues may be lost if not raised below, but having been raised below, the appellate court may find decision of those issues essential to disposition of the appeal, even where the lower court's decision was on other grounds. See Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 82 L.Ed. 224 (1937). Carte Blanche in its answer to the complaint raised its contention that class action treatment here is inconsistent with the Act. Rejection of that contention is necessary for affirmance.

As the majorty observes, Carte Blanche's argument, that this case cannot, consistent with the Act, be maintained as a class action, is based in part on the erroneous assumption that Katz and other class members seek only the imposition of the $100 minimum penalty provided by the Act. The

argument, however, is not defeated by that observation. The heart of Carte Blanche's contention is that permitting class action enforcement of the Act would expose Carte Blanche, and other credit card companies, to possibly staggering judgments. The possible loss is not lessened by the fact that the class involved here seeks damages possibly in excess of the statutory minimum recovery.

Carte Blanche concedes the lack of legislative history supporting its contention, but explains that "the potentially annihilating effect" of imposing liability of at least $100 per plaintiff-card holder in a class action "was never brought to the attention of Congress at the time the Act was being considered." In attempting to show that, nonetheless, the intent of Congress in passing the Act is inconsistent with class action enforcement, Carte Blanche relies on (1) the Act's attorneys' fees provision and (2) an appeal to common sense. Carte Blanche's argument on the first point is that availability of attorneys' fees to successful plaintiffs is a boon to individual actions and inclusion of this provision in the Act indicates an intent to promote individual, not class, enforcement. All that can be inferred from inclusion in the Act of a provision for award of fees in successful enforcement suits is that Congress desired to encourage private suits to enforce the Act; no necessary, or even probable, inference can be drawn that Congress intended to promote indiviual suits and prohibit class suits.

Carte Blanche's second argument is that liability for large judgments could ruin the entire consumer credit industry, an absurd result which Congress could not have intended. Carte Blanche's potential liability, however, would not be reduced by prohibiting class action enforcement of the Act; recovery by those injured, whom the Act

sought to protect, would merely be made more difficult—a result not in harmony with any expressed Congressional intent. See 1968 U.S.Code, Cong. & Admin. News, pp. 1962-2030. Thus, I would reject Carte Blanche's contention that class action treatment is inconsistent with the Act, and I would affirm the order of the district court.

ALDISERT, Circuit Judge (dissenting).

Much of the majority opinion is committed to defending the principle that a class determination *vel non* may be the subject of the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b). I was not aware that this was being challenged, see Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 734 (3d Cir. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1190, 28 L. Ed.2d 323 (1971). Rather, the very real § 1292(b) problem exemplified by this appeal is the imperative to set forth with specificity the "controlling question of law as to which there is substantial ground for difference of opinion. . . ." This court in banc had no assistance from the district court which certified this case for appeal, by the appellant who filed it, and by the panel of this court which permitted it to be lodged. The mere fact that a class action has been ordered is usually the subject of a "substantial ground for difference of opinion," as the majority frankly admits. Yet if every class action grant or denial were certified under § 1292(b) the appellate courts would be swamped by the second-guessing process of class determination which I view predominately sounding in fact, rather than in law. I fail to see an exotic question of law requiring definition or refinement by this court when the sole issue is whether the factual complex of a given case meets the class action requirements of Rule 23, F.R.Civ.P. Questions of law, not a fact, inhered

in Kauffman v. Dreyfus, *supra,* which met the issue whether a plaintiff, not a member of a class, could be a class representative.

If a question of law lurks in this appeal, and I suspect that one can be distilled from appellant's brief, it is an issue restricted to the damage aspects of plaintiff's complaint. Although reversing the class action determination, the court has failed to meet this issue.

Appellant's basic theme, sounded in Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972), and repeated in some 34 reported and unreported district court opinions chanting the same litany, is that a class action should not lie because in the event the court finds liability, an award of the statutory penalty of $100 for each class member would defeat the purpose of the Truth in Lending Act, 15 U.S.C. § 1601 et seq. and, moreover, would threaten the solvency of the appellant because the statutory penalty would greatly exceed potential actual damages.

So posited, this case does present a proper appeal on a controlling point of law which the parties briefed and argued, but which today this court does not meet. Chief Judge Seitz met the issue squarely, and I am in total agreement with his treatment and disposition of it. A class action is but the sum of its parts. If a part, one case, may be filed under TILA, and appellant so concedes, there can be no statutory bar to combining all of the parts.

"Because a class action, 'so instinct with benefits, is also wrought with mischievous effect,' it is imperative that participating litigants and the court never lose sight of the laudatory fundamental purposes of this procedural device. Its historical purpose was to alleviate the burden on the

court and its facilities in cases where a claim was common to a large number of persons." Greenfield v. Villager Industries, Inc., 483 F.2d 824, 831 (3d Cir. 1973) (footnote omitted).

Another difficulty which arises when the district court, the appellant, and this court fail to indentify the precise "controlling question of law" is the possibility of an appellate court decision based on contentions neither briefed nor argued by the parties. Although this difficulty did not arise in Johnson v. Alldredge, 488 F.2d 820 (3d Cir. 1973), I fear this is what has happened here. Distilled to its essence the court's opinion today yields a conclusion that the patent case of Blonder-Tongue Laboratries, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L. Ed.2d 788 (1971), somehow alters orthodox thinking on Rule 23 interpretations. The court today faults and reverses the district court for not concluding that an individual test case is superior to a class action on the liability phase of this law suit because of the "new" concept of collateral estoppel enunciated by *Blonder-Tongue:* "We think the *Blonder-Tongue* decision requires that a new look be taken at the alternative of a test case in lieu of an early class action determination." (Majority opinion at 760.)

I have extreme difficulty with this. First, the collateral estoppel issue was neither briefed nor argued by the parties neither before the panel nor before the court in banc. At the very least, the court should have requested additional briefing or oral argument on this issue.[1] Second, and more

[1] A number of arguments and rationalizations have been urged for the general rule that an appellate court will not consider sua sponte a legal argument not presented and urged by the litigants. These

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important, I question the underlying premises of the majority suggestion that the 1971 *Blonder-Tongue* case makes a jurisprudential contribution to class action litigation in this circuit which was not present at the time of the 1966 class amendments to Rule 23. For sixteen years prior to the adoption of the modern class action rules, the courts in this circuit followed the doctrine of Bruszewski v. United States, 181 F.2d 419 (3d Cir.), cert. denied, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950).

As to the effect of *Blonder-Tongue* in other circuits in non-patent cases, I am not at all certain that *Blonder-Tongue* has the sweep now attributed to it. The court utilized some extremely cautionary language:

> Undeniably, the court-produced doctrine or mutuality of estoppel is undergoing fundamental change in the common-law tradition. In its pristine formulation, an increasing number of courts have rejected the principle as unsound. Nor is it irrelevant that the abrogation of mutuality has been accompanied by other developments—such as expansion of the definition of "claim"

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might be summarized as follows: (1) the litigants have a right to control the litigation, therefore the court should decide only those questions raised by the parties; (2) No error requiring rectification has been committed by the lower court since the lower court has—by definition—not ruled on the matter if the question is raised for the first time by the appellate court sua sponte; (3) in some cases this last concept has been enlarged into a fundamental, jurisdictional limitation which foreclosed the consideration of a question not raised in the lower court; and finally (4) the losing party has had no opportunity to rebut the argument accepted by the court, which may in fact be erroneous, and the court has received no assistance in deciding the question from the litigants who are well informed in the matter.
Vestal, Sua Sponte Consideration in Appellate Review, 27 Ford.L.Rev. 477, 487 (1958-59). (Footnote omitted.)

in bar and merger contexts and expansion of the preclusive effects afforded criminal judgments in civil litigation—which enhance the capabilities of the courts to deal with some issues swiftly but fairly.

Obviously, these mutations in estoppel doctrine are not before us for wholesale approval or rejection. But at the very least they counsel us to re-examine whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invaild.

402 U.S. at 327, 91 S.Ct. at 1442. (footnotes omitted.)

Moreover, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), did not accord to *Blonder-Tongue* the inclusiveness attributed by the majority. (At 593, 94 S.Ct. 819.)

In sum, there is no "new look" in this circuit, and it is at least questionable that the *Blonder-Tongue* case mandates a re-tailoring of estoppel law in non-patent cases in those jurisdictions which do not share our *Bruszewski* views.

We have recently said: "Also influencing the general acceptance of class actions has been recognition of the fact that the collective or accumulative technique of this device makes possible an effective assertion of many claims which otherwise would not be enforced, for economic practical reasons, were it not for the joinder procedure. The 1966 amendments to Rule 23 are a restatement and reinforcement of public policy, mutually expressed by the Judicial Conference of the United States, its advisory committee on Rules of Civil Procedure, the Supreme Court, and the Congress, which candidly facilitate and encourage the use of class actions." Greenfield v. Villager Industries, Inc.,

supra, 483 F.2d at 831. Although the majority pay lip service to "the underlying assumption that class action disposition of multiple similar claims, especially small consumer claims, is socially desirable," the brute effect of its frontal assault on this policy will debilitate consumer class actions. To suggest that the litigative strength of a lone consumer on one small claim can be any match for the adversary's resources, simply because there is a provision in TILA for payment of attorneys' fees, is to ignore blithely the realities of mordern litigative processes. While there is biblical if not historical support for the notion that one David did slay a Goliath, the social desirability of consumer class action was to insure that a David plaintiff had a Goliath capability against the Goliath propensities of his adversary, and thus the real power of the courtroom adversaries would be equalized. I have a gnawing fear that this court, with a historic tradition of consumer protection today takes a major step backwards.

Finally, the observation is compelled that the majority, under the guise of the "superiority" finding, have now rewritten the opening mandate of Rule 23(c)(1): "*As soon as practicable after the commencement of an action brought as a class action,* the court shall determine by order whether it is to be so maintained." They would now have it read: "*As soon as practicable after the establishment of liability,* the court shall determine an action brought as a class action." This runs counter to the policy, if not the letter, of the Supreme Court's latest expression of class actions in American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974):

> A recurrent source of abuse under the former . . . [Rule 23] lay in the potential that members of the

> claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called "one-way intervention"—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that *members of the class would be identified before trial on the merits* and would be bound by all subsequent orders and judgments.[13]

(At 547, 94 S.Ct. at 763) (My emphasis). (Footnote omitted.)

Because it was faced with a statute of limitations issue, the Court was meticulous in emphasizing *when* the class action determination should be made:

> Under the present Rule, a determination whether an action shall be maintained as a class action is made by the court "as soon as practicable after the commencement of an action brought as a class action . . ." Rule 23(c)(1). Once it is determined that the action may be maintained as a class action under subdivision (b)(3), the court is mandated to direct to members of the class "the best notice practicable under the circumstances" advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not, and that a

[13] See Advisory Committee's Note to Proposed Rules of Civil Procedure, 39 F.R.D. 98, 105-106.

> member who does not request exclusion may enter an appearance in the case. Rule 23(c)(2). Finally, the present Rule provides that in 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notes and who have not requested exclusion. Rule 23(c)(3). Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practicable after the commencement" of the action when the suit is allowed to continue as a class and they are sent notice of their inclusion within the confines of the class. Thereafter they are either non-parties to the suit and ineligible to participate in a recovery or be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

(At 547, 94 S.Ct. at 763) (Footnotes omitted.)

For these reasons, I dissent and would affirm the judgment of the district court.

ADAMS, Circuit Judge (dissenting):

I dissent from the result reached by the majority.

a.

The threshold question here, of course, is whether the district court's determination that this case may proceed as a class action is subject to interlocutory review under section 1292(b).[1] I agree with the conclusion reached by

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[1] That the class action question is reviewable under 1292(b) is made particularly clear by Professor Kaplan, in Continuing Work of the Civil Committee—1966 Amendments to the Federal Rules of Civil Procedure (1), 81 Harv.L.Rev. 356, 390 n. 131 (1967), and by the Report of the ABA Special Committee on Federal Rules of Procedure, 38 F.R.D. 95, 104-05 (1965). The ABA Special Committee stated

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the other members of the Court that this question is reviewable.

b.

After settling the issue of appealability, the majority rules that the class action determination of the district court was improper. Having concluded that the district court erred in not giving fuller consideration to the "test case" as an alternative means of adjudication, the better approach, in my judgment, would be for the Court to remand for a new determination by the district court whether the case should proceed as a class action. Rather than doing so, the majority seems to bar the district court from reconsidering whether class action treatment is appropriate at the liability stage of this case. This appears, to me, to be erroneous.

Blonder-Tongue, taken together with *Bruszewski,* certainly does require a "new look" at the test case. However, the implications of *Blonder-Tongue* are not so settled as the majority appears to think. For example, even if that decision signals a general demise of the "mutuality" requirement, there is no means by which this Court could, with certainty, predict what *res judicata* or collateral estoppel effect would be accorded any judgment in favor of Katz.[2] More germane still is the observation that the

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that, "[W]e should be disturbed, however, if the change in the form of [Rule 23] caused the Courts to determine that there was no 'controlling question of law' but only questions of 'discretion' not subject to review under Subdivision (b) of Section 1292 of Title 28."

[2] "[A] court conducting an action cannot predetermine its *res judicata* effect . . . [T]his can be tested only in a subsequent action." C. Wright, Federal Courts, 314 (2d ed. 1970).

requirement of mutality, though possibly moribund, is not yet dead. Both *Blonder-Tongue* and *Bruszewski* though expressing principles wide-ranging in their implications, were cases where mutuality analysis was discarded to permit "defensive" use of collateral estoppel. Yet the other plaintiffs in this case would seek, in the majority's hypothetical instance, to make "offensive" use against Carte Blanche of a judgment in favor of Katz. I am not prepared, at least at this time, to hold that either *Blonder-Tongue* or *Bruszewski* would necessarily permit such a result.

Thus, though the unsteady law of *res judicata* and collateral estoppel justifies further consideration of the test case as an alternative to a class action, it is precisely the unsteadiness of that law—a quality fostered, not meliorated, by *Blonder-Tongue*—that prevents me from attaining the majority's certainty that a test case will be "superior." The apparent erosion of the mutuality requirement is an incipient development, not a *fait accompli*, and thus serves as a shaky foundation for an outright reversal of the district court's class determination. Rather, *Blonder-Tongue* generates only one consideration among many to be weighed by the district court.

c.

In my judgment, too, the Court should take this opportunity to dispose of the appellant's prime contention: that Congress intended to prohibit enforcement of the Truth in Lending Act (the Act) by way of class actions. The other dissenting opinions are correct, I think, in maintaining that the effect of the Act upon the class determination is a problem that may not be circumvented at this stage

of the case, especially when this issue has already been briefed and argued.

The Act provides for the recovery, in private actions, of twice the amount of any finance charge that is proved to have been illegally undisclosed.[3] However, the award in such an action may not exceed $1,000, nor amount to less than $100.[4] The Act makes further provision for the award of an attorney's fee to successful plaintiffs, thus creating "a species of 'private attorney general' to participate prominently in enforcement."[5]

The district court did not consider whether Congress intended to forbid class enforcement of the disclosure requirements of the Act. Carte Blanche, of course, argues strenuously that Congress did manifest such an intent. The majority declines to consider the question, apparently on the ground that any opinion on the matter would be rendered advisory should the district court determine that "actual damages" may be recovered, since "there is no suggestion that Congress intended to prohibit the recovery of actual damages in a class action."

This decisional reticence is puzzling. Whether "actual damages" or only the minimum $100 damages are sought, the arguments advanced by Carte Blanche in favor of the absolute preclusion of a class action are, in my judgment, equally pertinent. First, Carte Blanche contends that

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[3] 15 U.S.C. § 1640(a) (1).

[4] *Id.* A separate award may be recovered, of course, in connection with each consumer credit transaction in which any illegal nondisclosure occurs.

[5] Ratner v. Chemical Bank New York Trust Co., 329 F.Supp. 270, 280 (S.D.N.Y.1971).

class enforcement is inconsistent with the section of the Act providing for the recovery of attorney's fees. Second, Carte Blanche maintains that a class recovery under the Act might be so large as to be completely unjust. The impact of each of these arguments is undiminished by the fact that "actual" damages—by which is meant, presumably, something greater than the $100 minimum—may be recoverable in this action.[6] Thus, to guide the district court in its class determination, we should lay to rest all claims that the Act absolutely prohibits, or invariably permits, class enforcement.

There is little support in the legislative history for the proposition that Congress intended to bar all class action enforcement of the Act. True, Senator Moss of Utah, an active proponent of the Truth in Lending legislation, did remark at a hearing that "I do not believe class actions are permissible under Truth-in-Lending."[7] Assistant Attorney General (now Judge) McLaren, in direct response to Senator Moss, expressed the contrary opinion. He stated that the private right of action provided in the Act was subject to the Federal Rules of Civil Procedure and so amenable to class action treatment.[8] This scant background offers an inadequate basis for ruling that class enforcement of the Act is absolutely proscribed. Still

[6] The only damages recoverable in a TILA action are double the plaintiff's *actual* damages, except when actual damages exceed $500 (in which case only $1000 may be recovered) or are less than $50 (in which case $100 may be recovered).

[7] Hearings before the Consumer Subcommittee of the Senate Committee on Commerce on S. 2246, S. 3092, 91st Cong., 1st & 2nd Sess., ser. 91-43, pt. 1, at 27 (1970).

[8] *Id.*

less does this history warrant the conclusion that class treatment is *always* appropriate. To accept Carte Blanche's contention, therefore, or to accept the converse, "would be a work of clairvoyance and not of construction or interpretation."[9]

Without attempting to conjure up the myriad situations that might occur where class action treatment would be appropriate or inappropriate, it is sufficient to remark that in exercising the "considerable discretion of a pragmatic nature" conferred by the "broad and open ended terms"[10] of Rule 23, a district court should pay close attention to the Act's provisions and to the potential effect of a class recovery in a Truth in Lending case.

Rule 23(b)(3), under which the class determination in this case was and will be made, permits the maintenance of a class action if, *inter alia*, a district court:

> "Finds . . . that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[11]

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[9] Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336, 344 (10th Cir. 1973), wherein the court also ruled that there might be class action enforcement of the Act.

[10] Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y.1972).

[11] Rule 23 states that "matters pertinent" to a finding of superiority include:

> "(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) The difficulties likely to be encountered in the management of a class action."

The majority reverses the district court's finding of "superiority," and orders postponement of the class action determination until the question of liability has been settled. There is, in my view, no basis for such a ruling. The proper course would appear to be to remand, giving the district court the benefit of our views on the appropriate factors to be considered in its "superiority" investigation. This conclusion—that remand, not outright reversal, is called for—proceeds from the "broad and open-ended terms" of Rule 23, and the generous discretion vested thereby in the district court.[12]

Upon such remand or, in any event, when the class action determination is finally made, there are considerations emanating directly from the Truth in Lending Act which should bear upon the district court's inquiry into superiority.

First, it must be noted that the litigative incentive often provided by the class action, through the aggregation of small claims into one large enough to call forth the financing requisite to the institution of suit, is, in this case, furnished by the Act's provision for a "reasonable attorney's fee." The attorney's fee is recoverable by any victorious plaintiff, irrespective of whether he seeks the minimum $100 award or some larger amount. Thus, while it may be

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[12] *Ratner, supra* Note a. 54 F.R.D. at 416. *See also* Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1967); Note, Proposed Rule 23: Class Actions Reclassified 51 Va.L.Rev. 629, 642, 650-60 (1965). Judge Aldisert, dissenting, appears to approach this view when he says "if every class action grant or denial were certified under §1292(b) the appellate courts would be swamped by the second-guessing process of class determination which I view predominantly sounding in fact, rather than in law."

conceded that the private class action often serves the useful function of inducing citizens to institute socially beneficial litigations, it certainly appears that this goal has been well-served by the provision in the Act for attorney's fees. Accordingly, the class action is not necessarily "superior" to an individual action, at least insofar as such superiority might derive from the incentive to bring suit.

Second, if this case is allowed to proceed as a class action, the class might include as many as 700,000 or 800,000 members, or the number of Carte Blanche cardholders.[13] Were such a class to be victorious on the merits, the recovery in this action might run as high as $80,000,000, even if only minimum damages were sought by each plaintiff. Such a liability could conceivably bankrupt the defendant, and force it to cease operation. This prospect of a "horrendous, possibly annihilating punishment"[14] for a technical violation of the Act is certainly a relevant consideration in any inquiry into the "superiority" of a class action as a means of enforcing the statute.

These two factors, then—the existence of the attorney fee provision, and the crippling impact of the potential class recovery—should, at the very least, be weighed in the district court's exercise of the discretion conferred by Rule 23. Numerous other courts, in a variety of circumstances, have ruled that Truth in Lending claims may not

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[13] This fact—the enormity of the potential class—proceeds from the nature of the business as well as from the structure of the Act, in that a violation thereof can normally be expected to have been committed against all, or a large number, of the credit card holders of a company such as Carte Blanche.

[14] *Ratner, supra,* Note 9, 54 F.R.D. at 416.

be pursued as class actions. Such courts have perceived a similar confluence between the provisions of the Act and the considerations specified by Rule 23(b)(3).[15] The very nature of Rule 23 prevents me from saying that the district court must conclude that a class action will not be a "superior" method of adjudicating this controversy.[16] Nonetheless, the effect of the Act is such that a finding of "superiority" would seem unlikely, at least from this vantage.

d.

As noted by the commentators, Rule 23 confides to the district courts a broad range of discretion and managerial latitude regarding class actions.[17] It is they, rather than the appellate courts, who must provide the creative imagination necessary to make the Rule workable. These are numerous factors, some already considered, some not, which the district court in this case should have the prime responsibility of evaluating: Rule 23(c)(1)'s directive that a class action deterimination be made as "soon as practicable;" the attorney's fee provision of the Act; the potentially stultifying impact of a class recovery; the alternative of a test case;[18] the possibility that some plaintiffs may

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[15] *See e. g., Ratner, supra,* Note 9; Graybeal v. American Savings and Loan Ass'n 59 F.R.D. 7 (D.D.C.1973); Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336 (10th Cir. 1973). Compare Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99 (E.D.N.Y. 1973).

[16] *See* Note 11, *supra,* and accompanying text.

[17] *See* Frankel, *supra,* Note 11, 43 F.R.D. at 39.

[18] As the Advisory Committee's Note to Rule 23 suggests, "one or more actions agreed to by the parties as test or model actions may be preferred to a class action. . . ." *See also* Eisen v. Carlisle and Jacquelin, 391 F.2d 555, 572 (2d Cir. 1962) (dissenting opinion of Lumbard, C.J.).

be barred by the statute of limitations;[19] and other considerations dictated by the express terms of Rule 23.

In short, as previously indicated, the district court, not this Court, is the apppropriate forum for the resolution of the question whether this particular case should, at this time, go forward as a class action.

e.

Thus, I would reverse the decision of the district court and remand for a new class action determination.

[19] Though the Supreme Court has stated, in American Pipe and Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the action been permitted to continue as a class," there may yet be circumstances under which the statute will bar individual actions. In *American Pipe* certain class members, as to whom the statute was held tolled, had made motions to intervene under Rule 24 after the district court had decided against maintenance as a class action. This circumstance may or may note obtain in this case.

Opinion of District Court 11/18/71

Ruben J. KATZ, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CARTE BLANCHE CORPORATION,

Defendant.

Civ. A. No. 69-1326.

UNITED STATES DISTRICT COURT
W. D. PENNSYLVANIA

Nov. 18, 1971.
As Amended Nov. 26, 1971.

TEITELBAUM, District Judge.

This is the second and dispositive opinion in this action relative to the plaintiff's Motion For Determination of Class Action under Federal Rule of Civil Procedure 23. Brought representatively by Reuben Katz, formerly an authorized holder of one of the defendant, Carte Blanche Corporation's credit cards, this action seeks damages not only on behalf of Mr. Katz, but also on behalf of all those similarly situated, i.e., all those authorized holders of one of the defendant's credit cards since July 1, 1969, for what are alleged to be violations of the Truth In Lending Act[1] and Regulation Z (12 C.F.R. 226) promulgated thereunder. Specifically, the allegations surround the disclosures

[1] 82 Stat. 146 et seq. (15 W.S.C.A. § 1601 et seq.)

made (or not made) by the defendant with respect to certain "finance charges": (1) the annual membership fee which the defendant charges its cardholders, (2) the late charge which the defendant assesses its cardholders' unpaid overdue balances, and (3) the finance charge which is imposed upon unpaid balances which are outstanding pursuant to defendant's extended payment plan. The class which the plaintiff seeks to represent numbers in excess of 600,000 members.

PREDOMINANCE AND SUPERIORITY

In Katz v. Carte Blanche Corporation, 52 F.R.D. 510 (D.C.W.D.Pa., 1971) (Katz I), we decided that the class proposed to be maintained and represented by the plaintiff in this action satisfied the prerequisities of Subsection (a) of F.R.Civ.P. 23, but withheld decision, pending further proceedings, as to the satisfaction of the provisions of Subsection (b) (3)[2] thereof. Essentially, to satisfy Subsection (b) (3) it must be found that,

> ". . . the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class

[2] "[T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

> action is superior to other available methods for the fair and efficient adjudication of the controversy."

We noted in Katz I that the difficulties likely to be encountered in the management of a class of the proportions of that proposed in the instant action was of crucial consideration to both of these required findings. Specifically, we found problematical the highly personalized nature of the individual question regarding the use (consumer or business) to which the defendant's credit card is put, and queried the possibility of a test case, as a superior alternative, in light of the provision of the Truth In Lending Act for recovery by a successful plaintiff of costs and reasonable attorney's fees.

Some confusion surrounded the meaning of the term test case. A classic test case with binding legal effects on all those affected by its outcome is not possible, of course, without the express consent of all those affected, both parties and non-parties. In the case *sub judice* in which the obtaining of the express consent of non-nominal parties is an impracticability, the procedural device by which to bind all non-nominal parties to the outcome of the case is the class action.[3] The term test case as applicable here, therefore, means a test case for practical purposes. In other words, if the plaintiff's motion for determination of a class

[3] Since our circuit has decided that an action proposed as a class action shall proceed as a class action unless and until it is determined otherwise, all members of the proposed class are more properly non-nominal parties than non-parties. See Kahan v. Rosenstiel, 424 F.2d 161 (3rd Cir. 1970).

action is denied the instant action becomes, in practical effect, a case not legally binding upon anyone other than Mr. Katz, and it is the superiority of that alternative which we must evaluate.

Sheer size of a class is not negatively determinative of the issue of the superiority of a class action. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). The critical determinant is that of its manageability—judicially, administratively and practically—as a class action. In Katz I we observed that the manageability inquiry is also that upon which the issue of whether or not the common issues predominate over the individual issues turns. The findings as to the manageability of at least the instant action as a class action, thus intertwines the two requirements of the provisions of Subsection (b) (3), and the core consideration evolves as whether or not the instant action is manageable as a class action in light of the individual question as to the use, consumer or business, which we originally found so problematical.

The defendant urges that the subjectivity of that question makes the class unmanageable. It urges that it would be entitled to cross-examine each member of the class[4] as to the nature of the use to which he put his Carte Blanche

[4] The definition of the class (and subclasses as will be hereinafter delineated)will have to include, for purposes of notice, all authorized Carte Blanche card-holders since July 1, 1969, with a "personal" account. (Some accounts are designated "company" accounts and may readily be eliminated at the outset.) Whether or not a card-holder's account is designated "personal" in its application to the defendant, of course, has no bearing on the question of the use to which he puts his card.

credit card.[5] The existence of an individual question, however, is not unique to this case. Almost all of the actions sought to be maintained as class actions under Subsection (b) (3) since the amendment of F.R.Civ.P. 23 in 1966 have alleged either securities frauds or anti-trust violations. And in each of those kinds of actions individual questions are present. Our initial inquiry, then, will be for the purpose of deciding whether or not the individual questions in those kinds of actions are more manageably resolvable than the individual question which pervades this action.

In the class action cases alleging anti-trust violations the individual questions of damages and membership in the class[6] have, almost universally,[7] been deemed to be not insurmountable obstacles. Illustrative of the principles involved are Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (D.C.S.D.N.Y.1971) and City of Philadelphia v. American

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[5] The plaintiff argues that a consumer use under the Truth In Lending Act is any use in which the cardholder "consumes", which includes virtually *any* use by a business entity. This argument is patently ill-founded, indeed, frivolous. The determination of what is and is not a consumer use depends on the circumstances and motives surrounding the particular use to which the card is put in a given situation.

[6] Membership in the class will be an individual question inevitably, and in the instant action if the class could practically be defined to include only those cardholders who used their cards for consumer uses the individual question would be tantamount to proof of membership in the class. It is only significant as an individual question when as in an anti-trust case, its confirmation by the defendant is other than perfunctorily available.

[7] See, *contra,* School District of Philadelphia v. Harper & Row Publishers, Inc., 267 F.Supp. 1001 (D.C.E.D.Pa., 1967).

Oil Co., 53 F.R.D. 45 (D.C.N.J., 1971). In *Eisen*, a class of potentially, 6,000,000 public shareholders who had engaged in "odd-lot" transactions was determined to be manageable. Facilitating that determination was the fact that the answers to the two individual questions involved were reasonably subject to verification by the defendant independent of a member's mere assertion. Those facts so ascertainable were (1) the identity of a member of the class and (2) the number of "odd-lot" transactions in which a member had engaged. The court decided that if liability were established, an approximation of the aggregate damages to the class could be computed, and a claim to that aggregated amount could be asserted by members of the class and could be verified by the member's stockbroker. The class was defined as all those public shareholders who engaged in "odd-lot" transactions. What was verifiable in Eisen was essentially membership in the class and damages.

In the instant action although the definition of the class includes all those who used the Carte Blanche credit card for business as well as consumer purposes, proof of the use to which a card was put by a cardholder is fairly analogous to proving membership in a class. The obvious, and perhaps ultimately fatal, difference is that in this case, proof of the use to which a card was put by a cardholder admits neither of such convincing independent confirmation nor of such an aggregation of the total damages to the class. It was for that reason that one of the classes proposed in *City of Philadelphia* was found to be unmaintainable. In that case, a variety of plaintiffs alleging anti-

trust violations proposed a variety of classes for the maintenance of class actions against a multitude of gasoline companies. Among the classes proposed were, in the States of Delaware, New Jersey and Pennsylvania, (1) all governmental entities that purchased the defendants' products, (2) all taxicab owners and operators who purchased the defendants' products, (3) all those commercial truckers who purchased defendants' products in tank wagon quantities, and (4) all those individual motorists who purchased defendants' products. On the theory that while those members of classes (1), (2), and (3) were likely to have retained records which would support membership in the class and damage claims, those of class (4) were unlikely to have retained such records, the Court found only classes (1), (2), and (3) manageable. Thus in neither *Eisen* nor *City of Philadelphia* was the individual question truly a subjective one. It was rather a fact of a transaction which was independently verifiable by the defendants.

The difficulty in the instant action is not proof of a transaction, but proof of circumstances and motives surrounding a transaction. The fact of a transaction here is as readily verifiable as in *Eisen* or *City of Philadelphia*.[8] Our inquiry then narrows to whether or not manageable methods are available to feasibly accommodate proof of the surrounding circumstances. In terms of the availability of either or both independent, presumably disinterested verification or supporting records, we think such manageable methods may be developed. A cardholder claim-

[8] See also In re Coordinated Pretrial Proceedings In Antibiotic Antitrust Actions, Opinion No. 2, M 19-93A (D.C.S.D.N.Y., 1971) in which it was decided that a consumer's druggist could certify particular purchases to prove a claimant's membership in a class.

ing a consumer use could have his employer or employers certify that a particular use of his card was not for business purposes. Further, the income tax returns and supporting documents and records could be made available to the defendant to assess the vulnerability to challenge of a particular cardholder's claim. In short, it appears to us that with the cooperation of counsel, the submission and screening of affied to proof of perhaps certified claims by members of the class, together with resort to income tax returns and supporting records in appropriate instances would suffice to establish a consumer use of the card if the defendant is found to have violated the Truth In Lending Act.

Alternatively, the proposition on which many class actions alleging securities frauds are permitted to proceed could be adopted. The principal individual question in securities fraud cases (aside from damages which, of course, is an individual question in every class action is usually one of reliance, i.e., whether or not the individual purchaser or seller of the securities relied on the misrepresentations of the defendant in buying or selling the securities. That proposition is, as quoted in Katz I, that,

> ". . . the possible necessity for separate trials on specific individual issues does not bar a class action." Epstein v. Weiss, 50 F.R.D. 387 (D.C.E.D.La., 1970).[9]

[9] To support this proposition the following cases were cited in Epstein: Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968); Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (D.C.S.D.N.Y., 1966); Fischer v. Kletz, 41 F.R.D. 377 (D.C.S.D.N.Y., 1966); Weiss v. Tenney Corp., 47 F.R.D. 283 (D.C.S.D.N.Y., 1969); Dolgow v. Anderson, 43 F.R.D. 472 (D.C.E.D.N.Y., 1968); Fogel v. Wolfgang, 47 F.R.D. 213 (D.C.S.D.N.Y., 1969); Mersay v. First Republic Corp., 43 F.R.D. 465 (D.C.S.D.N.Y., 1968).

This proposition is consistent with the Advisory Committee's Note to F.R.Civ. P. 23 at 39 F.R.D. 98 (1966). In discussing Subsection (c) (4) which provides that,

> "[W]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues * * *",

the Advisory Committee noted that,

> "[F]or example, in a fraud or similar case the action may retain its 'class' character only through the adjudiciation of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims."

Coming in to prove the use to which the cardholder put his card and damages would not necessarily mean coming into this district. Since the defendant operates nationwide, provision may be made for the prosecution by the members of the class of their individual claims in their home districts. This alternative is available, of course, in conjunction with, as well as an alternative to the submitting of affied to claims.

It must be remembered that the foundation of a class action is that it is "a semi-public remedy administered by the lawyer in private practice". Kalven and Rosenfield, The Contemporary Function Of The Class Suit, 8 U.Chi. L.Rev. 684, 717 (1941). It is often the only practical effectuation of remedial provisions of legislative policies. The action of Federal agencies entrusted with the enforcement of public policy is limited to compelling compliance with a statute. Private litigation, particularly in the form of a class action, serves to supplement administrative action in furthering the public policy. See J. I. Case v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed. 2d 423 (1964).

Indeed, only private litigants may seek damages which are usually an integral aspect of a statutory scheme.[10]

In conclusion, we think manageable methods are available for the resolution of the individual questions of the use to which the cardholder put his credit card and the damages he suffered, and therefore find the common questions to predominate over the individual questions and the class action to be superior to other available methods for the fair and efficient adjudication of the controversy.[11]

Further, we find that the class is divisible into subclasses as allowed by Subsection (c) (4) (B).[12] The primary class will consist of all those authorized holders, since July 1, 1969, of one of the defendant's credit cards,[13] and

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[10] See Katz I, n. 6.

[11] We are compelled to note here the oft-stated and oft-applied principle that if there is to be error it should be made in favor of the maintenance of a class action. See Esplin v. Hirschi, *supra*, n. 9. Nonetheless, this finding has not been easy in its arrival. The question of the manageability of this action as a class action is a close one. We have approved the maintenance of this action as a class action, with neither the "petulant predictions of doom" nor the "cheerful readiness to experiment" which Professor Kaplan forecast. See Kaplan, Continuing Work Of The Civil Committee: 1966 Amendments Of The Federal Rules Of Civil Procedure (I), 81 Harv.L.Rev. 356 (1967). Rather we have approached it with particular regard for precedent and the policies underlying both F.R.Civ.P. 23 and the Truth In Lending Act, and with consideration for both plaintiff's and defendant's positions as will become more apparent hereinafter. Our conclusion, we think, will ultimately facilitate the final disposition of this action, fairly and efficiently.

[12] See Katz I, n. 5.

[13] As previously noted, the primary class cannot be defined to include only those who used the card for consumer purposes since that cannot be predetermined. The class need not be limited to only those who will ultimately recover, however, since, of course, the common questions need not be total or dispositive. Dolgow v. Anderson, 43 F.R.D. 472, 490 (D.C.E.D.N.Y., 1968).

will be the focus of the allegations with respect to the annual charge. There will be two subclasses. One will consist of all those authorized holders, since July 1, 1969, of one of the defendant's credit cards who were assessed a late charge for an overdue unpaid balance, and will be the focus of the allegations with respect to the late charge. The other will consist of all those authorized holders, since July 1, 1969, of one of the defendant's credit cards who paid finance charges pursuant to the defendant's extended payment plan, and will be the focus of the allegations with respect to the finance charge.

NOTICE

Notice to the members of a class in a class action is governed by (1) fundamental due process standards and (2) the requirements of F.R.Civ.P. 23 (c) (2). In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) the controlling requirement of fundamental due process was stated to be,

> ". . . notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

F.R.Civ.P. 23(c) (2) provides as follows:

> "In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[14]

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[14] In addition F.R.Civ.P. 23(c) (2) provides that,

"[T]he notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date;

(Footnote continued on following page)

This provision is "designed to fulfill [the] requirements of due process". Advisory Committee's Note, 39 F.R.D. 98, 107 (1966). In accommodating that design it must be borne in mind that it is contemplated by a Subsection (b) (3) class action that all those members who do not request exclusion will be bound by the judgment. F.R.Civ.P. 23(c) (3). The effectuation of notice is thus most crucial in a class action, such as the instant class action, which is maintained pursuant to Subsection (b) (3). Indeed notice is only required by F.R.Civ.P. 23 in such a class action.

F.R.Civ. P. 23(c) (2) provides that generally notice should be the best practicable under the circumstances. However, it provides that in specific instances when members of a class can be identified through reasonable effort, those who can be so identified shall be notified individually. In this case, the individual members of the whole class can be readily identified through reasonable effort. It is simply a matter of Carte Blanche assembling a complete list of all those who have been authorized holders of its credit card since July 1, 1969. Since all members of the subclasses are necessarily members of the primary class, all members of both the primary class and the subclasses will be notified of the action. While the breadth of individual notice will not effect economies, it is, as the best possible notice, dictated by the circumstances, particularly, that of the ease with which the individual members of the class can be identified. Further, as the best possible notice,

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(Footnote continued from preceding page)

(B) the Judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

its compliance with both the rule, and *a fortiori,* the requirements of due process, which must be the primary considerations, can not be doubted.

We are not aware of Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (D.C.S.D.N.Y., 1971). In that case it was stated that,

> ". . . where a class consists of a large number of claimants with relatively small individually claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required."

One of the basic rationales underlying the class action mechanism is that it will afford large numbers of claimants with similar but individually small claims access to the courts. Nevertheless the rule itself provides, indeed requires, individual notice when the individual members of the class are identifiable through reasonable effort. Factually, *Eisen* involved a considerably larger class than that with which we are confronted in the instant action. Further, the approximately 2,000,000 of the 6,000,000 members of the class who were identifiable in *Eisen* were not nearly as easily identifiable as those in this case. We have therefore concluded that the breadth of the notice which we are requiring in this case will not necessarily impose the "insuperable tariff on prosecution of the case" which was anathema in *Eisen.*

Before discussing the form, content, and manner of dissemination of the notice we must decide who shall pay its cost. Although the rule makes no provision for the payment of the cost of notice, generally, the cost is to be borne by the plaintiff at least in the first instance. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Weiss

v. Tenney Corp., 47 F.R.D. 283 (D.C.S.D.N.Y., 1969); Richland v. Cheatham, 272 F.Supp. 148 (D.C.S.D.N.Y., 1967). See Ward and Elliot, The Contents And Mechanics Of Rule 23 Notice, 10 B.C.Ind. & Comm.L.Rev. 557 (1969) and Kaplan, Continuing Work of the Civil Committee; 1966 Amendments of the Federal Rules of Civil Procedure, *supra*. While the matter is apparently discretionary with the courts, we think that in this case the general tack should be taken. We appreciate that the costs of notice will not be insubstantial. However, the courts have held that this burden may be shifted to defendants (who usually have more of an ability to bear the costs) only when the merits of the case suggest the probability of the plaintiff's successful prosecution of the action. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (D.C.S.D.N.Y., 1971) and Dolgow v. Anderson, 43 F.R.D. 472 (D.C.E.D.N.Y., 1968). In following the general practice of requiring the plaintiff to pay for the cost of notice, we are not unmindful of the merits of the instant action.[15] Too, the genuine issues of fact which exist will have to be resolved by the jury which the plaintiff has demanded. This makes less certain any review of even those of the merits with potential. The cost of notice, then, shall be borne initially by the plaintiff.[16] If, as stated in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968),

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[15] As a result of an essentially evidentiary hearing, substantial evidence as to the merits presently appears in the record.

[16] The only other conceivable responsibility for the cost of notice, other than the plaintiff or the defendant, would lie with the court. We agree with the Court in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568 (2d Cir. 1968) where it was stated that there was no support for the " * * * position adopted in School District of Philadelphia v. Harper & Row Publishers, Inc., 267 F.Supp. 1001 (E.D.Pa.1967) that the court itself has the burden of sending out the proper notice."

> ". . . financial considerations prevent the plaintiff form furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit."[17]

The cost of notice, of course, will be recoverable by the plaintiffs if the action is prosecuted successfully.[18] For the purpose of taxing costs, however, in the event of the success of the action, the class and the two subclasses will be treated as separate and distinct actions. Unless the action is successfully prosecuted by the primary class on the claim with respect to the annual charge (in which case the total cost of notice will be recoverable), the cost of notice will be allocated among the subclasses, and only those costs allocable to the subclass or subclasses which are successfully prosecuted will be recoverable. The allocation will be by the number of members in the successful subclass or subclasses as compared with the number in the primary class.

There remains for us to consider the form, content, and manner of disseminating the notice. The form and content of the notice is set forth as Appendix A. Briefly, the notice advises the members of the class of the pendency of the proposed action; (1) of the rights (a) to be excluded and (b) to appear, if desired, if exclusion is not requested; (2) of the binding effects of a judgment if exclusion is not requested; (3) of the possibility of liability for the share of

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[17] See also Buford v. American Finance Co., 33 F.Supp. 1243 (D.C. N.D.Ga., 1971) and Givens v. W. T. Grant Co., Civil Action No. 14295 (D.C.D.Conn., 1971).

[18] See Katz I, n. 6.

the costs allocable to the unsuccessful class or subclasses; and (4) of the possibility, if exclusion is not requested, of a counterclaim by Carte Blanche for sums alleged to be owed to Carte Blanche. The bottom portion of the notice is to be perforated so that it can be detached and returned to the Clerk of this Court to request exclusion. Those who do not desire to be excluded need not return the bottom portion, i.e., no preliminary proof of claim or indication of intent to prove a claim will be required. All those who do not request exclusion will become members of the class.

Mechanically, notice will be produced and disseminated in the following manner. The cardholders with personal accounts will be divided into two groups: (1) those members of the class who will be sent a regular monthly bill during the month next practicable after the production of the notice, and (2) those members of the class who will not. With respect to those who will be sent regular monthly billings, the plaintiff will supply to the defendant a sufficient number of notices and unstamped self-addressed return envelopes for inclusion in the monthly billings. The plaintiff will bear the burden of the cost of the production of the notice and the purchase of the return envelopes. The plaintiff, further, will reimburse the defendant for the cost of the labor to stuff such notices and return envelopes in with the defendant's monthly billings.[19] With respect to those who will not be sent regular monthly billings, the

[19] If the inclusion in the regular monthly billings of the notice and the unstamped, self-addressed envelopes pre-empts the inclusion of revenue producing advertisements, the loss of revenue will be borne by the defendant. This loss, however, may be recoverable by the defendant if it prevails.

defendant will produce for the plaintiff, at the cost of the plaintiff, address labels. Envelopes on which to place those address labels will be purchased by the plaintiff and the plaintiff will be responsible for stuffing those envelopes with the notices and return envelopes, and mailing them, postage prepaid, to the members of the class who will not be sent regluarly monthly billings, including those who are no longer Carte Blanche cardholders.

From the information furnished the court by the plaintiff and defendant, we estimate that the total cost to the plaintiff of effecting notice in the manner proposed will be approximately $37,500.00. In the context of the magnitude of the instant action this amount does not appear to be so great amount to the sounding of its death knell.

Finally, the Order granting the plaintiff's Motion For Determination Of Class Action will be certified for appeal pursuant to 28 U.S.C. § 1292, and the proceedings will be stayed pending appellate disposition of any appeals taken. Included among the proceedings which will be stayed will be the defendant's recently made (November 8, 1971) Motion For Partial Summary Judgment.

An appropriate order will be entered.

APPENDIX A

NOTICE OF PENDENCY OF CLASS ACTION

Reuben Katz, a Carte Blanche cardholder, has commenced a legal action in this Court against Carte Blanche Corporation seeking damages for alleged violations of the Federal Consumer Credit Protection Act. Further, Mr. Katz seeks to maintain the action not only on his own behalf, but

also on behalf of all those persons who have been authorized Carte Blanche cardholders since July 1, 1969. The violations alleged are that Carte Blanche has failed to disclose to its cardholders various terms and conditions of its credit plan in the form, manner and terminology required by the Act. Carte Blanche has denied the alleged violations, and has asserted various affirmative defenses to the action.

THE COURT HAS NOT EXPRESSED ANY OPINION ON THE MERITS OF THE ACTION AND THE SENDING OF THIS NOTICE IS NOT TO BE CONSTRUED AS AN EXPRESSION OF ANY OPINION.

The purpose of this notice is simply to advise the members of the class on whose behalf the action has been brought of the pendency of the action and of their rights with respect thereto as follows:

1. Unless you request to be excluded from the class by _____ (by postmark) you will be included in the class and,

   a. any judgment, whether favorable or not will bind you,

   b. you may be liable to share, proportionately, the costs of the action if it is unsuccessful, and

   c. you may be subject to a counterclaim by Carte Blanche for any sums which you may owe Carte Blanche and which are overdue.

2. To request to be excluded from the class you must inform the Clerk of this Court by appropriately marking the attached notice and returning it in the enclosed return envelope _____ (by postmark).

3. If exclusion is not requested but you prefer to be repsented by your own counsel, you may enter an appearance through him but not later than _____ (by postmark).

The class does not include company accounts, but only personal accounts. Further, of the personal accounts, because those cardholders who used their cards exclusively for business or commercial purposes will ultimately be eliminated from the class should the action be successful, such cardholders must request exclusion to avoid the possibility of liability for the proportionate costs of an unsuccessful action.

The attorneys representing the class are Litman, Litman, Harris and Specter, P.A., Esquires, 1320 Grant Building, Pittsburgh, Pennsylvania 15219.

REUBEN J. KATZ, on behalf of himself and all others similarly situated,
Plaintiff,

vs.

CARTE BLANCHE CORPORATION,
Defendant.

No. 69-1326
CIVIL ACTION

NAME _____
ADDRESS _____
_____

CARTE BLANCHE CREDIT CARD NO. _____

I hereby request to be excluded from the class on whose behalf Reuben Katz has filed the above-captioned civil action.

_____,
Signature.

Opinion of District Court 6/1/71

Reuben J. KATZ, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CARTE BLANCHE CORPORATION,

Defendant.

Civ. A. No. 69-1326.

UNITED STATES DISTRICT COURT
W. D. PENNSYLVANIA

June 1, 1971.

TEITELBAUM, District Judge.

This action is brought by the plaintiff on his own behalf and on behalf of each person similarly situated, who, at any time since July 1, 1969, has been an authorized holder of one of the defendant's credit cards. The gravamen of the complaint is that the defendant failed to properly make certain pre-transaction and transaction disclosures to its credit card holders regarding the application and computation of certain "finance charges" in violation of the Truth in Lending Act, 82 Stat. 146 et. seq. (15) U.S.C.A. § 1601 et. seq.), and Regulation Z (12 C.F.R 226) promulgated thereunder. The "finance charges" which, allegedly, were improperly disclosed are three in number: (1) the annual charge which is imposed as a precondition to the extension of a credit card (2) the late charge which is as-

sessed unpaid balances which are overdue, and (3) the finance charge which is imposed upon unpaid balances which are outstanding pursuant to an extended payment plan. The disclosures with respect to those "finance charges" were, and are, allegedly contained in various written communnications and statements issued to the members of the class. This motion is to have the Court determine that this action may be maintained as a class action under Federal Rule of Civil Procedure 23.

To be maintainable as a class action under F.R.C.P. 23, the instant class must satisfy the prerequisites of Subsection (a)[1] and the provisions of Subsection (b) (3)[2] thereof. The plaintiff has the burden of satisfying these prerequisites and provisions. City of Philadelphia v. Emhart Corporation, 50 F.R.D. 232 (D.C.E.D.Pa., 1970); Philadelphia Electric Compay v. Anaconda American Brass

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[1] "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

[2] "[T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Co., 43 F.R.D. 452 (D.C.E.D.Pa., 1968); Advisory Committee's Note, 39 F.R.D. 98, 104 (1966). Initially, we decide, however, that none of these prerequisites and provisions encumber the plaintiff with the burden of preliminarily demonstrating merit to his underlying cause of action. This accords with the pronouncement of Kahan v. Rosenstiel, 424 F.2d 161, 169 (C.A. 3, 1970), that,

> "[T]he determination whether there is a proper class does not depend on the existence of a cause of action."

Other Courts have similarly resolved this issue. In Mersay v. First Republic Corporation of America, 43 F.R.D. 465 (D.C.S.D.N.Y., 1968), the Court decided that the proof of the elements of the plaintiff's claim which was ultimate to the litigation was not properly a predeterminant, under F. R.C.P. 23, to the maintenance of a class action. And in Fogel v. Wolfgang, 47 F.R.D. 213 (D.C.S.D.N.Y., 1969), the Court held the defendant's argument that discovery had established his freedom from wrongdoing to be "substantially irrelevant" in determining the maintainability of a class action. Dolgow v. Anderson, 43 F.R.D. 472 (D.C.E.D.N.Y., 1968), in which a hearing was ordered for the purpose of requiring the plaintiff to convince the Court that there was a substantial possibility of his prevailing on the merits prior to the Court's determination of whether or not a class action was maintainable, is to be distinguished. While that Court plainly held that unless so convinced, the action was not to be allowed to proceed as a class action, in reaching that holding, the Court confronted the questions

of who was responsible for what notice to whom[3] and suggested that the defendant might properly bear the burden of effecting and financing notice. In that context, the Court was unprepared to assign such a burden without first examining the merits of the plaintiff's case. Since, however, the questions of who is responsible for what notice to whom need not be confronted in determining the bare maintainability of a class action,[4] we do not reach them in rendering this opinion.

Professor Moore suggests that the requisite preliminary showing be a minimal demonstration that the complaint is "sincere" or "more than frivolous". 3B Moore's Federal Practice ¶7 *(sic)* 23.45 [3]. We think this is a reasonable prerequisite and, on the basis of the instant complaint, conclude that the plaintiff's allegations are sincere or more than frivolous.

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[3] F.R.C.P. 23(c) (2) provides as follows:
"In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel".

[4] The maintainability of a class action, of course, is hollow if it is decided that legally the plaintiff is to bear the expense of notice if financially he is unable to do so. In Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (C.A. 2, 1968), the Court allowed that if,

> " * * * financial considerations prevent the plaintiff from furnishing individual notice to [members of the class] there may prove to be no alternative other than the dismissal of the class suit".

THE PREREQUISITES OF SUBSECTION (a)

The plaintiff represents that the instant class numbers approximately 600,000 members. A class of that size makes joinder of all members not only impracticable, but impossible. The prerequisite of impracticability of joinder is clearly satisfied.

It is equally clear that the instant suit presents questions of law and fact which are common to the class. The Act requires that certain disclosures of certain charges be made to persons extended credit. Aside from modifications with time, it is undeniable that the communications and statements issued to the respective members of the class concerning the respective charges were uniform, *i.e.*, with respect to the annual charge, the same disclosures were made, properly or improperly, to each member of the class, and with respect to the late charge and the finance charge, the same disclosures were made, properly or improperly, respectively to each member of the class who suffered an overdue unpaid balance and to each member of the class who elected to make payments on the extended payment plan. The particular members to whom disclosures were made, properly or improperly, concerning the imposition of the late charge or the exaction of the finance charge, may possibly form subclasses as allowed by subsection (c) (4) (B) of F.R.C.P. 23.[5] The outlined standardized conduct of the de-

[5] "[A] class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly". The formation of subclasses in class actions appears to be the rule rather than the exception. See Green v. Wolf Corp., 406 F.2d 291, 299 (C.A. 2, 1968); City of Philadelphia v. Embart Corporation, *supra*, 235; and Philadelphia Electric Company v. Anaconda American Brass Co., *supra*, 455.

fendant with respect to those respective members of the class, we think, presents at least "a common nucleus of operative facts". Siegel v. Chicken Delight Inc., 271 F. Supp. 722, 726 (D.C.N.C.Cal., 1967). (*sic*)

The defendant suggests that since the Act does not cover the extension of credit for business or commercial purposes and since many of the members of the class use their credit cards solely or primarily for such purposes, neither the facts nor the claims of the plaintiff are common to all members of the class. The plaintiff concedes that those members of the class who use their credit cards solely for business or commercial purposes are without the coverage of the Act. Nothing in F.R.C.P. 23, however, mandates that the identity of the questions of fact or law be total. Siegel v. Chicken Delight Inc., *supra*, 726. 3B Moore's Federal Practice ¶ 23.45[2]. In Esplin v. Hirschi, 402 F.2d 94, 100 (C.A. 10, 1968), the Court quoted from Dolgow v. Anderson, *supra*, 490, as follows:

> "[T]he common issues need not be dispositive of the entire litigation. * * * [T]he fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible".

This observation is clearly consistent with F.R.C.P. 23 which itself requires that, in an action of this nature, the questions of law or fact common to the members of the class "predominate" over any questions effecting only individual members. The defendant's suggestion simply raises the sole individual question of fact applicable to the class and subclasses.

Moreover, the questions of law involved in this action attach coincidentally to the respective members of the class i.e., the statutory provisions upon which the determination of the lawfulness or unlawfulness of the disclosures which were made, mismade, or not made by the defendant will turn, are correlevant and coincident thereto. We conclude, therefore, that common questions of law and fact are presented by this action.

That the plaintiff's claims are typical of the claims of the class, too, is equally clear. The plaintiff represents that he held one of the defendant's credit cards on July 1, 1969, and has held one continuously since, that disclosures with respect to each of the three alleged "finance charges" have been made, mismade or not made to him, that he has had each of the charges imposed upon or exacted from him, and that he has paid each of them. The defendant contends that since the plaintiff uses his credit card primarily for business purposes, he is not typical of the class which he seeks to represent. The requirement of typicality contemplates that the claims of the nominal plaintiff be representative of those of the members of the class whom he purports to represent and that he not have interests which are in conflict with or inimical to those of the other members. Mersay v. First Republic Corporation of America, *supra*. In this case, the plaintiff's claims appear to be representative of the respective members of the class. If he successfully establishes the facts regarding the defendant's disclosures as he has alleged and the law is as he interprets it, then he will have advanced those claims which are typical of each of the respective members of the class which he represents. Further, we detect no interests of the plaintiff in the maintenance of

this action which are in conflict with or inimical to those of the other members. The fact that he may have used his credit card on most occasions for business purposes does not negate his representation that he used the card on some occasions for consumer purposes. Since the Act does not discriminate between or among consumer uses, we conclude that the coincidence of the nominal plaintiff's claims with those of the respective members of the class, and the absence of conflict therewith, satisfies the requirement that his claims be typical of the claims of the class.

The final prerequisite mandates that the representative parties will fairly and adequately protect the interests of the class. The fact that the plaintiff is only one of a class of approximately 600,000 is irrelevant. As stated in Epstein v. Weiss, 50 F.R.D. 387, 391 (D.C.E.D. La., 1970), citing Green v. Wolf, *supra*, and Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (C.A. 2, 1968),

> "[I]t is now well settled that neither the number of representative parties nor their financial interests is controlling in determining whether the plaintiffs will fairly and adequately protect the interests of their class. Thus a single plaintiff may represent the entire class, no matter how small his claim may be, if other factors indicate that he will fairly and adequately protect the interests of his class."

The Courts have held that this prerequisite is satisfied if (1) the representatives share, without conflict, the interests of the unnamed members of the class and (2) the Court is assured that the representatives will vigorously prosecute the rights of the class through qualified counsel. Epstein v. Weiss, *supra*, 392; Cannon v. Texas Gulf Sulphur Com-

pany, 47 F.R.D. 60 (D.C.S.D.N.Y., 1969); and Shulman v. Ritzenberg, 47 F.R.D. 202 (D.C.D.C., 1969). Quantitative analyses are not relevant to this determination. Shulman v. Ritzenberg, *supra*. The first consideration overlaps with the question of typicality which we have concluded to be satisfied. The second, and primary, consideration is the "forth-rightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process". Mersay v. First Republic Corporation of America, *supra*, 470. That the plaintiff's attorney be "qualified, experienced, and generally able to conduct the proposed litigation" is indispensable. Eisen v. Carlisle & Jacquelin, *supra*, 562. These judgments must obviously be made on an *ad hoc* basis. In this case we conclude, from the demonstrations of counsel to date, that this prerequisite is satisfied.

THE PROVISIONS OF SUBSECTION (b) (3)

Under Subsection (b) (3), we proceed to inquire whether those questions which are common to the class predominate over any questions affecting only individual members thereof and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The common questions will predominate if, "the complaint alleges a common course of conduct over a period of time, directed against the members of the class * * * and violating common statutory provisions". Epstein v. Weiss, *supra*, 393, citing Esplin v. Hirschi, *supra*, 100. In this case, the course of the defendant's relevant conduct and the law applicable thereto, is

common to all members of the class and subclasses, respectively. The only individual questions which we perceive in this instance are of what use the members of the class made of his credit card and, if the defendant is found to have violated the Act and Regulation, what damages has the member sustained.[6]

Most of the suits brought as class actions pursuant to F.R.C.P. 23 to date have alleged securities frauds which often involved individual elements of misrepresentation and reliance, as well as damages. If a common course of conduct is found, however, these individual elements have been uniformly held not to preclude the maintenance of a class action. Esplin v. Hirschi, *supra;* Green v. Wolf, *supra;* Epstein v. Weiss, *supra;* Mersay v. First Republic Corporation of America, *supra;* and Dolgow v. Anderson, *supra.* As noted in Epstein v. Weiss, *supra,* 394, citing Green v. Wolf, *supra,* 301 and Esplin v. Hirschi, *supra,* 100,

> "[T]he Courts have consistently recognized that the possible necessity for separate trials on specific individual issues does not bar a class action."

Similarly, suits brought as class actions alleging antitrust violations have been allowed despite the individual issues of damages. Eisen v. Carlisle & Jacquelin, *supra;* City of Philadelphia v. Emhart Corporation, *supra;* State of Illinois v. Harper Row Publishers, Inc., 301 F. Supp. 484 (D.C.N.D.Ill., 1969); and Philadelphia Electric Company v. Anaconda American Brass Co., *supra.*

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[6] The Act provides for liability to an aggrieved person "in an amount equal to the sum of (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court".

Notwithstanding this line of decisions, we find problematical the highly personalized nature of the individual question regarding the use to which the defendant's credit card is put. We are undecided as to whether or not that question makes the class unmanageable, with the result that the common questions do not predominate.[7] For that reason, we reserve judgment on the issue of predominance.

We now turn to a consideration of the superiority of the class action in this instance. The other available methods to be considered in determining the superiority of the class action for the fair and efficient adjudication of the controversy, were enumerated in Dolgow v. Anderson, *supra*, 487, 488 as joinder, intervention, consolidation, the test case and the administrative agency. While joinder, intervention, consolidation and the administrative agency do not offer preferable alternative methods, we are intrigued by the possibility of a test case. Ordinarily a test case is inappropriate when any given member of a group which has been wronged has not been sufficiently damaged to justify the institution of suit solely on his own behalf. As stated in Dolgow v. Anderson, *supra*, 485, citing Kalven and Rosenfield, The Contemporary Function of the Class Suit, 8 U.Chi.L.Rev. 684, 686 (1941),

> "[T]he class action is particularly appropriate where those who have allegedly been injured are in a poor

[7] F.R.C.P. 23(b) (3) enumerates four factors which are to be considered in making findings under (b) (3), including (D) the difficulties likely to be encountered in the management of a class action. We think that the manageability factor is pertinent not only to the findings with respect to superiority but also to those with respect to predominance.

> position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive."

The Truth in Lending Act, however, provides for recovery, by a successful plaintiff, of costs and reasonable attorney's fees. This provision, it seems to us, raises the question of whether or not a test case may be superior to a class action in this case, notwithstanding that the possibility of failure may deter poorer plaintiffs.

We conclude that the prerequisities of Subsection (a) are satisfied but that the provisions of Subsection (b) dictating the predominance of the common questions of law or fact and the superiority of the class action are in need of further exploration and development. To that end, we find it necessary to solicit memoranda on the questions of the manageability and superiority of this proposed class action. Additionally, we will consider the question of notice at this time.

ORDER

And now, this 28th day of May, 1971, it is ordered that counsel for the plaintiff file a menorandum of law and fact on or before June 11, 1971, and that counsel for the defendant file a reply memorandum on or before June 21, 1971. The memoranda will be confined to a consideration of the following questions:

(1) Is the spectre of parading, potentially, 600,000 members of the class before the Court to resolve the individual issues involved such as to make this suit unmanageable as a class action?

(2) Is a test case superior available alternative method to a class action of fairly and efficiently adjudicating this case?

(3) How, in detail, shall the unnamed members of the class be notified of the action and who shall bear the burden, mechanically and financially, of such notification? (The consideration of this question shall include estimates of costs of notice.)

Pending resolution of these questions and the determination of the class action issue, neither plaintiffs or their counsel, nor defendants or their counsel shall solicit or contact the proposed class independently in connection with this suit without prior court approval.

It is further ordered that Argument on these matters will be held on July 6, 1971, at 10:00 A.M., in Court Room #10, Fifth Floor, United States Post Office and Court house.

Amended Judgment On Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1054

REUBEN J. KATZ, on behalf of himself
and all others similarly situated

vs.

CARTE BLANCHE CORPORATION,
Appellant

(D. C. Civil Action No. 69-1326)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, Chief Judge and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges

Amended Judgment On Rehearing

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed November 18, 1971, be, and the same is hereby reversed and the cause is hereby remanded for further proceedings in accordance with the opinion of this Court. Each party shall bear his or its own costs.

ATTEST:
THOMAS P. QUINN
Clerk

April 16, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1054

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

v.

CARTE BLANCHE CORPORATION,
Appellant.

(D.C.Civil Action No. 69-1326)

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

Order

Upon consideration of the appellee's motion for leave to file a petition for rehearing out of time, and appellant's response in opposition thereto, in the above entitled case, by the active judges of the circuit, all of whom participated in the decision, a majority not having voted to grant the motion, the motion for leave to petition for rehearing out of time is denied.

By the Court,
JOHN GIBBONS
Circuit Judge

Dated: July 3, 1974

Supreme Court, U.S.
FILED
SEP 9 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-102

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

Petitioner,

v.

CARTE BLANCHE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT CARTE BLANCHE CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CLOYD R. MELLOTT
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Carte Blanche Corporation

September 9, 1974

INDEX

	Page
Question Presented	1
Counter-Statement Of The Case	2
Argument	10
I. The Decision Of The Court of Appeals En Banc Does Not Conflict With The Decisions Of This Court	10
II. The Court Of Appeals En Banc Has Not Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court	14
Conclusion	16

TABLE OF CITATIONS

CASES

Page

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1972) 10, 12

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 14, 15

Bruszewski v. United States, 181 F.2d 419 (3rd. Cir.), *cert. denied*, 340 U.S. 865 (1950) 14

Eisen v. Carlisle & Jacquelin ___ *U.S.*___ 94 S. Ct. 2140 (May 28, 1974) 2, 3, 10, 11, 12

Katz v. Carte Blanche Corporation, 52 F.R.D. 510 (W.D. Pa. 1971) (Katz I) 5, 6, 8

Katz v. Carte Blanche Corporation, 53 F.R.D. 539 (W.D. Pa. 1971) (Katz II) 5, 6, 7, 8

Katz v. Carte Blanche Corporation, No. 72-1054, (3rd. Cir., May 22, 1973) (Katz III) 6, 7, 8

Katz v. Carte Blanche Corporation, 496 F.2d 747 (3rd. Cir. 1974) (Katz IV) 7, 8, 9, 11, 12, 14

In Re Michigan-Ohio Building Corp., 117 F.2d 191 (7th Cir. 1941) 15

Lord v. Veazie, 49 U.S. 251 (1850) 15

M.C. & L.M. Railway Co. v. Swan, 111 U.S. 379 (1883) . 15

STATUTES

Truth-in-Lending Act § 130, 15 U.S.C.A. § 1640 .... 1, 2, 4

Truth-in-Lending Act § 104, 15 U.S.C.A. § 1603 5

28 U.S.C. § 1292 6

RULES

Page

Rule 23, F.R.C.P. 1, 2, 9, 10, 12
Rule 23(a), F.R.C.P. 5
Rule 23(b), F.R.C.P. 5, 6, 8, 10
Rule 23(c), F.R.C.P. 5, 6-7, 9, 10, 12, 13

In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-102

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT CARTE BLANCHE CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Where, in this action brought as a class action under Section 130 of the Truth-in-Lending Act, the Court of Appeals for the Third Circuit, sitting en banc, has determined, by proper application of all appropriate provisions of Rule 23 of the Federal Rules of Civil Procedure, that this action should not be maintained as a class action as to the liability phase of the case and has remanded the case to the District Court for trial of the liability phase as an individual test case, is this determination inconsistent with any decisions of this Court.

COUNTER-STATEMENT OF THE CASE

On March 15, 1974, the Court of Appeals for the Third Circuit, sitting en banc, determined, pursuant to Rule 23 of the Federal Rules of Civil Procedure, that an individual test case was superior to a class action for the fair and efficient adjudication of the liability issues involved in this action brought under Section 130 of the Truth-in-Lending Act, 15 U.S.C.A. § 1640. The present Petition for Writ of Certiorari is merely the latest in a series of efforts by the Petitioner, Reuben J. Katz (hereinafter "Katz" or "Petitioner"), to avoid this determination of the Court of Appeals en banc by attempting to argue that it is inconsistent with the decision subsequently rendered by this Court in *Eisen v. Carlisle & Jacquelin*, ____ U.S. ____, 94 S.Ct. 2140 (May 28, 1974) [hereinafter "*Eisen*"].

At a conference of counsel held by the District Court on May 31, 1974, the effect of the *Eisen* decision on this action was extensively discussed, and the District Court concluded that there was nothing in *Eisen* which required it to alter or disregard the decision of the Court of Appeals en banc, stating as follows:

> "THE COURT: I'm going forward to dispose of the case as a test case because I see nothing in *Eisen* that says I shouldn't."

Following the District Court's decision that there was no inconsistency between this Court's decision in *Eisen* and the decision of the Court of Appeals en banc in the present case, Katz on June 10, 1974 sought relief from the Court of Appeals in two ways: (1) by filing a Motion for Leave to Petition for Rehearing out of time (hereinafter "Motion re Rehearing"), with the proposed Petition for Rehearing attached thereto; and (2) by filing a Petition for Writ of

Mandamus (hereinafter "Petition for Mandamus") directed against the District Court Judge to whom this action is assigned. The Motion re Rehearing and Petition for Mandamus filed by Katz, both of which were based upon an alleged inconsistency between *Eisen* and the Court of Appeals en banc decision, were referred to the Court of Appeals en banc for decision. Respondent, Carte Blanche Corporation (hereinafter "Carte Blanche"), filed its Response to the Motion re Rehearing on June 14, 1974, and on July 3, 1974 the Court of Appeals en banc entered an Order denying that Motion. The parties thereafter filed briefs on the Petition for Mandamus, which is still pending before the Court of Appeals en banc.

As a result of Katz' ongoing effort to make the decision of the Court of Appeals en banc somehow appear inconsistent with this Court's decision in *Eisen*, the statement of the case contained in Katz' Petition presents a wholly erroneous and distorted view of the nature of this action and the various decisions made by the District Court, the panel of the Court of Appeals, and the Court of Appeals en banc on the question of whether this action should be maintained as a class action. For example, Katz completely misstates the precise holding of the Court of Appeals en banc (see Pages 11-12 of Petition); Katz fails to even mention the basis for the decision of the panel of the Court of Appeals (see Page 12 of Petition), which is helpful to a proper understanding of the subsequent decision of the Court of Appeals en banc; and Katz wholly ignores the decision of the District Court to the effect that there is nothing inconsistent between *Eisen* and the decision of the Court of Appeals en banc (see Page 12 of Petition). Briefly stated immediately below are the facts relating to the nature of this action and each of the four district and appellate court decisions on the question of whether this action should be maintained as a class action.

Katz' Complaint under Section 130 of the Truth-in-Lending Act seeks to recover from Carte Blanche the statutory penalty of not less than $100 for Katz and each member of the alleged class, together with costs of suit and attorneys' fees. Since the alleged class consists of more than 800,000 members, the potential statutory penalty involved in this action is eighty million dollars, which exceeds by many times the net worth of Carte Blanche and would actually bankrupt it (4a).* Katz' Complaint is based upon the allegations that three types of charges paid under certain circumstances by Carte Blanche's cardholders are "finance charges" within the meaning of the Act and that Carte Blanche failed to comply with the disclosure requirements of the Act with respect to such "finance charges".** The three types of charges in question are the following (2-3a):

(1) The annual membership dues.***

(2) The late charges imposed upon the unpaid balances of cardholders' accounts which are in default.

(3) The charges made in connection with Carte Blanche's extended payment plan for airline tickets.

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*References to the Appendix filed by Petitioner will be designated as " a".

**While there has been no decision rendered on the merits of Katz' claims, Carte Blanche has raised substantial defenses to all such claims and submits that it has not violated the Truth-in-Lending Act in any respect.

***On June 5, 1974, the District Court granted partial summary judgment in favor of Carte Blanche on the ground that the annual membership dues is not a "finance charge" within the meaning of the Act. Since all Carte Blanche cardholders are potentially subject to the imposition of late charges if they do not pay their statements on time, the size of the alleged class has not been reduced by the granting of this partial summary judgment.

On January 22, 1971 Katz filed a Motion pursuant to Rule 23(c)(1) asking the District Court to determine that this action could be maintained as a class action. The District Court wrote two Opinions on this Motion, the second of which granted the Motion and resulted in the appeal to the Court of Appeals. *Katz v. Carte Blanche Corporation*, 52 F.R.D. 510 (W.D. Pa. 1971) (Katz I [81a]); *Katz v. Carte Blanche Corporation*, 53 F.R.D. 539 (W.D. Pa. 1971) (Katz II [62a]).

The District Court concluded in Katz I that the requirements of Rule 23(a) were satisfied in the present action but that the provisions of Rule 23(b), which require that the questions common to the class predominate over any questions affecting only individual class members and that the class action be superior to the other available methods of adjudication, "are in need of further exploration and development" (92a). On the question of predominance, Katz I found "problematical the highly personalized nature of the individual question regarding the use to which the defendant's credit card is put", and stated that the District Court was then "undecided as to whether or not that question makes the class unmanageable" (91a).* On the question of superiority, the District Court stated in Katz I that it was "intrigued by the possibility of a test case" as an alternative method of adjudication (91a).

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*The "highly personalized" and "individual" issue to which Katz I referred relates to the provision of the Act that extensions of Credit for business or commercial purposes are not covered by the Act (Section 104, 15 U.S.C.A. §1603). Thus, it must be determined for each member of the alleged class whether he used his card for business or consumer purposes, and this "highly personalized" issue can only be resolved by individual examination of each member and his records.

The "further exploration and development" mandated by Katz I in connection with the questions of superiority and predominance under Rule 23(b)(3) took the form of memoranda submitted by the parties, an evidentiary hearing, and a comprehensive stipulation of the facts. However, all of the foregoing related to the class action determination under Rule 23(c)(1), and none of them was for the purpose of making an inquiry, preliminary or otherwise, into the merits of the action.

Katz II upheld the maintenance of this action as a class action, but expressed serious doubts concerning its decision, observing that "this finding has not been easy in its arrival" and that "(t)he question of the manageability of this action as a class action is a close one" (71a). On the question of manageability, Katz II again emphasized that the issue of consumer versus business purpose was both "individual" and "subjective" with respect to each member of the alleged class, and stated that this issue was "perhaps ultimately fatal" to the maintenance of this action as a class action (67-68a). Katz II certified the granting of class action treatment for appeal pursuant to 28 U.S.C. §1292, and Carte Blanche thereafter filed a Petition for Leave to Appeal, which was granted by the Court of Appeals (78a).

The panel of the Court of Appeals which considered this action rendered its decision on May 22, 1973, holding that the District Court had not abused its discretion in permitting this action to proceed as a class action, at least as to the issues relating to Carte Blanche's liability under the Act. *Katz v. Carte Blanche Corporation*, No. 72-1054, (3rd Cir., May 22, 1973) (Katz III) (Slip Opinion, Page 6). In reaching the holding that the action could be maintained as a class action with respect to the liability issues, the panel relied upon Rule 23(c)(4)(A) which provides that "When appropriate (A) an

action may be brought or maintained as a class action with respect to particular issues . . . ." (Slip Opinion, Page 6).

The panel, however, expressed serious reservations as to whether any subsequent issues in this case (which the panel regarded as damage issues) were appropriate for class action treatment. With respect to the issue of consumer versus business purpose and the issue raised by Carte Blanche's counterclaims against many class members with delinquent balances owing to Carte Blanche, the panel observed that "class proceedings may well be inappropriate for litigating these issues" (Slip Opinion, Page 6). In this regard, the panel of the Court of Appeals, concluded as follows (Slip Opinion, Page 8):

> "[M]erely because class treatment has been afforded litigation of the underlying legal issues does not mean that the issue of damages must be similarly adjudicated."

As noted above, the District Court made its class action determination without any inquiry into the merits of the case. Similarly, the panel of the Court of Appeals which decided Katz III was fully cognizant of the requirement that "the initial determination [under Rule 23(c)(1)] must be made without benefit of actual litigation of the case" (Slip Opinion, Page 3).

Pursuant to Carte Blanche's Petition for Rehearing, the Court of Appeals en banc vacated Katz III and granted a rehearing before the Court en banc. The Court of Appeals en banc rendered its decision on March 15, 1974 [*Katz v. Carte Blanche Corporation*, 496 F.2d 747 (3rd Cir. 1974) (Katz IV) (1a)], reversing the District Court's decision in Katz II. In Katz IV, the Court of Appeals en banc concluded, *inter*

alia, that an individual test case was superior to a class action for adjudicating the liability issues in this action. In this regard, the precise holding of the Court of Appeals en banc in Katz IV was as follows (29a):

> "We have concluded that the order appealed from must be reversed because the superiority finding was in error."*

Further, the Court of Appeals en banc expressed the same grave reservations that the panel had enunciated in Katz III as to the suitability of this action proceeding as a class action as to any other issue (29-32a).

Thus, when the decisions by the panel in Katz III and the Court of Appeals en banc in Katz IV are read together, the conclusion is inescapable that the Court of Appeals en banc has decided that this case should not proceed as a class action on the liability phase thereof because class action procedure is not the superior method for the fair and efficient adjudication of this controversy. At the same time, it is also clear that Judge Teitelbaum in Katz I and II, the panel in Katz III and the Court of Appeals en banc in Katz IV have all agreed that the so-called damage phase of this case is not appropriate for class action treatment.

Nevertheless, at this stage of these proceedings, the result is that the Court of Appeals en banc has remanded the case to the District Court for further proceedings in accor-

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*The Court of Appeals en banc reviewed the District Court's Rule 23(b)(3) superiority determination in light of six pertinent interests affected by the determination and the issues involved in the action (24a), and concluded that a class action was not the superior method for the adjudication of the liability issues in this case. Carte Blanche presented several other reasons why this case should not be allowed to proceed as a class action. However, in view of the decision rendered by the Court of Appeals en banc, it was not necessary to consider these other reasons.

dance with its Opinion. Those proceedings will include going forward with a complete disposition of the liability phase of this case. There will be no so-called mini hearing, but rather a full and complete consideration of the liability phase of this controversy subject to all of the provisions of due process which are required to be observed in such a proceeding. At the same time, the Court of Appeals en banc in Katz IV has left to the sound discretion of the Trial Judge, in accordance with the specific provisions of Rule 23, the question of whether, if liability is found, any further proceedings under Rule 23 on the merits of any remaining issues in the case would be appropriate. While the conclusion to be reached in this regard has been foretold by the previous considerations thereof by the Trial Judge, the panel, and the Court of Appeals en banc, the present status of this case is that, consistent with the specific provisions of Rule 23(c)(1) and Rule 23(c)(4)(A), the Trial Judge may consider at some future time if appropriate the question of whether any other phase of this case should proceed as a class action. Accordingly, the Trial Judge has correctly decided that he intends to "dispose of the case as a test case" in accordance with the mandate of the Court of Appeals in Katz IV.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS EN BANC DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

At Pages 13-17 of his Petition, Katz argues that the decision of the Court of Appeals en banc conflicts with the decisions of this Court in *Eisen, supra,* and *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1972), to the effect that the question of whether an action may be maintained as a class action must be resolved before a decision on the merits.

The answer to this position is obvious. The argument made by Katz simply ignores the fact that in the present case the appropriateness of maintaining this action as a class action has been determined before any such decision on the merits. The District Court certified this action as a class action before any evidence was received or any determination was made as to the merits of the action. Similarly, the panel of the Court of Appeals specifically observed that "the initial determination [under Rule 23(c)(1)] must be made without benefit of actual litigation of the case" (Slip Opinion, Page 3). The panel then determined, without reference to the merits of the case, that the liability issues in this action are "readily amenable to disposition by class suit" (Slip Opinion, Page 6), but expressed doubts that the damage phase of the case would be appropriate for class treatment. The Court of Appeals en banc reversed on the ground that an individual test case would be superior to a class action for adjudication of the liability phase of the case, while expressing the same doubts as the panel with respect to whether the damage phase of the case should be treated as a class action. It is clear that the Court of Appeals based its decision upon the criterion of superiority under Rule 23(b)(3), and not upon its view

of the merits of Katz' claims. Thus, the question of whether this action may be maintained by a class action has been ruled upon and reviewed on three occasions, and on each of those occasions the decision has been made on the basis of the criteria set forth in Rule 23 and not upon any inquiry, preliminary or otherwise, into the merits of the case.

We submit that a careful reading of this Court's decision in the *Eisen* case demonstrates that it is inapposite to the case at bar and that it in no way affects the premises upon which the Court of Appeals en banc based its decision in Katz IV. Petitioner has simply misinterpreted the *Eisen* case.

Eisen stands, *inter alia*, for the proposition that a preliminary determination of the merits of the action may not be made in order to determine whether the action may be maintained as a class action or for the purpose of determining which of the parties should bear the cost of notice. The important reason for the *Eisen* holding is as follows (84 S. Ct. at p. 749):

> "[A] preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant."

The differences between the facts in *Eisen* and those in the present case are readily apparent. The present case involves no preliminary determination of the merits discussed in *Eisen*. In the present case, a full scale trial on the issue of liability is contemplated and certainly the traditional rules and procedures will be applicable to this trial. Furthermore, as previously pointed out, the Court of Appeals en banc has not postponed determination of the appropriateness of this

case as a class action on the issue of liability. The class action determination has been made finally in that regard.

At the same time, consistent with the provisions of Rule 23(c)(1)and Rule 23(c)(4)(A), the Court of Appeals decision in Katz IV has left to the sound discretion of the Trial Judge the question of whether any other part of this case should be considered for class action treatment. Such further consideration is specifically contemplated by the foregoing subdivisions of Rule 23 and is in no way inconsistent with this Court's decision in *Eisen*.

The present case is equally consistent with this Court's decision in *American Pipe*, since, as discussed above, the Court of Appeals en banc has made the class action determination required by Rule 23(c)(1). In addition, it should be pointed out that *American Pipe* was decided prior to the decision of the Court of Appeals en banc and was specifically cited and discussed by the Court of Appeals en banc in support of its decision in Katz IV (25a-26a). Further, both *Eisen* and *American Pipe* were concerned with delays in the class action determination on the ground that they operated *unfairly* in favor of the potential class members and *against the defendant*. Even assuming that these decisions had any application to the facts of the present case, which clearly they do not, it is extremely doubtful that Katz, as the representative of the members of the alleged class in the present case, would be in any position to rely upon them.

Thus, the proceedings in this case have demonstrated complete consistency both with all of the provisions of Rule 23 and this Court's Opinions in *Eisen* and *American Pipe*. The question of class determination has in no way been postponed nor is there any plan to have a preliminary determination of the merits of the case prior to making a class action determination. On the contrary, careful consideration has

been given on four separate occasions to the question of the appropriateness of this case for class action treatment. A decision has been finally made that at this stage of these proceedings, class action treatment of the liability phase of this case is inappropriate because it is not the superior method for the fair and efficient adjudication of the controversy. While these same four decisions have each expressed grave reservations concerning whether the so-called damage phase of this case would be appropriate for class action treatment, a final decision in this regard is not necessary at this stage of these proceedings. Therefore, consistent with the specific provisions of Rule 23(c)(1) and Rule 23(c)(4)(A), if a final determination is necessary on this question, that determination has been left to the Trial Judge at some future time. Under all of these circumstances, no question is presented which is worthy of consideration by this Court on certiorari.

II. THE COURT OF APPEALS EN BANC HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Katz contends at Pages 18-20 of his Petition that, while *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) held mutuality of estoppel to be unessential and applied the concept in a situation wherein it was used defensively, it did not approve the offensive use of collateral estoppel. Katz thereupon contends that this Court should grant certiorari to consider this "important question."

We submit that a review of the entire decision in Katz IV leads inescapably to the conclusion that the Court of Appeals en banc would have held that this action should not proceed as a class action even without any consideration of collateral estoppel. The Court of Appeals en banc considered all of the interests and issues involved in the present action and in class actions generally in the course of reaching its decision that the class action was not the superior method of proceeding. One of these factors was that, under *Blonder-Tongue, supra*, and *Bruszewski v. United States*, 181 F.2d 419 (3rd Cir.), *cert denied*, 340 U.S. 865 (1950), a judgment for Katz in an individual test case would have a collateral estoppel effect against Carte Blanche. The Court of Appeals en banc also observed that Carte Blanche was not seeking the benefit of mutual estoppel which would result from a class action certification in this case, being content instead to rely upon the stare decisis effect of a judgment in its favor in an individual case. As noted above, these two factors and other important considerations ultimately led the Court of Appeals en banc to reverse the panel's conclusion that class action treatment was appropriate and to conclude that class action treatment was not the superior method of proceeding in this case.

In any event, it is clear that the matter of the offensive use of collateral estoppel is simply not an issue in this case at the present time. The Court of Appeals en banc has concluded that a decision against Carte Blanche in an individual test case on the liability phase of this case would have a collateral estoppel effect. Carte Blanche is not before this Court seeking a review of this conclusion. Clearly, Katz is not in a position to seek appellate review of this conclusion since it is favorable to the members of the alleged class whose interests Katz purports to represent. *In re Michigan-Ohio Building Corp.*, 117 F.2d 191 (7th Cir. 1941). Even assuming that the matter of mutuality of estoppel is regarded as an "important question of federal law which has not been, but should be, settled by this Court," the present case is clearly not the proper occasion for the Court to consider that question since it is not crucial to the Court of Appeals en banc decision and there is no issue between the parties in the present case with respect to that question. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra* at 320 (1970); *M.C. & L.M. Railway Co. v. Swan*, 111 U.S. 379 (1883); *Lord v. Veazie*, 49 U.S. 251 (1850).

CONCLUSION

For all of the reasons stated above, Respondent respectfully submits that no issue is presented in this case which is worthy of the grant of certiorari by this Court. Thus, Respondent respectfully prays that Katz' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Carte Blanche Corporation

September 9, 1974

SUPREME COURT, U. S.
SEP 17 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-102

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

Petitioner,

v.

CARTE BLANCHE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT CARTE BLANCHE CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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At the time Respondent filed its Brief in the captioned matter, the Court of Appeals for the Third Circuit en banc had not yet decided the Petition for Writ of Mandamus filed with it by Petitioner. On September 11, 1974, a decision in favor of Respondent was rendered on that Petition for Mandamus and it was denied.

The Order of the Court of Appeals en banc and its Opinion are reproduced below.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 74-1563

REUBEN J. KATZ, on behalf of himself and all others similarly situated,
Petitioner

vs.

HUBERT I. TEITELBAUM, UNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF PENNSYLVANIA,
Nominal Respondent

CARTE BLANCHE CORPORATION,
Respondent

Present: SIETZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS AND GARTH, *Circuit Judges*

Upon consideration of petitioner's application for writ of mandamus and the answer of the respondent in opposition thereto, both in the above-entitled case,

It is ORDERED that petitioner's application for writ of mandamus be, and hereby is denied, in accordance with the opinion of this Court.

ATTEST: /s/ THOMAS F. QUINN
Clerk

September 11, 1974

OPINION OF THE COURT
(Filed Sep. 11, 1974)

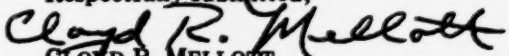
PER CURIAM

Petitioner Katz seeks a writ of mandamus to compel the nominal respondent, The Honorable Hubert I. Teitelbaum, Judge of the United States District Court for the Western District of Pennsylvania, to apply the law announced by the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 42 U.S.L.W. 4804 (U.S., May 28, 1974), which petitioner contends is inconsistent with the mandate of this court in *Katz v. Carte Blanche Corp.*, No. 72-1054 (3d Cir., filed March 15, 1974). In opposition to the petition, the defendant Carte Blanche urges first, that there is no such inconsistency and second, that use of a petition for a writ of mandamus to obtain an interlocutroy declaration from this court on the effect of the *Eisen* decision would be an improper use of the writ.

If in fact the mandate of this court in *Katz v. Carte Blanche, supra* is inconsistent with a subsequent decision of the Supreme Court, it is clear that the law announced by that higher authority, rather than this court's mandate, will be the appropriate rule of decision. The controlling effect of the mandate from a higher to a lower court is an application of the law of the case doctrine, and that doctrine yields to the authority of a source of law higher than that of the court which issued the mandate. *See Banco Nacional de Cuba v. Sabbatino*, 383 F.2d (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *United States v. Butenko and Ivanov*, 494 F.2d 593, 693 (3d Cir. 1974) (Gibbons, J. dissenting). We have no doubt that Judge Teitelbaum, aware that the mandate of this court in no way limits his authority to consider the effect of the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin, supra*, will give that decision appropriate consideration in his

rulings during the further progress of this case. We express no opinion at this time as to the effect of the *Eisen* opinion on those rulings. Under the circumstances we see no need for the issuance of a writ.

Respectfully submitted,



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